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Oct. 9. 1876.

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## SUPREME COURT OF THE UNITED STATES.

No. 223.

FRANKLIN C. SMITH, APPELLANT,

vs.

THE FORT SCOTT, HUMBOLDT AND WESTERN RAILROAD COMPANY AND THE COUNTY OF BOURBON ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

**FILED OCTOBER 11, 1876.**

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1 In the circuit court of the United States of America, district of Kansas.

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| FRANKLIN C. SMITH, COMPLAINANT, *vs.* THE FORT SCOTT, HUMBOLDT AND WESTERN Railroad Company, and the County of Bourbon, State of Kansas, and the County Commissioners of Bourbon County, State of Kansas, defendants. | 1361. |

Be it remembered that on this day, to wit, the 7th day of August, 1875, the said complainant, by Miller & Frost, and J. H. Gillpatrick, his solicitors and counsel, filed in the clerk's office of said court his bill of complaint and bond for costs in the above-entitled suits which said bill of complaint and bond for costs, with the endorsements thereon, are in the words and figures following, to wit:

*Bill of complaint.*

In the circuit court of the United States for the district of Kansas. November term, 1875.

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| FRANKLIN C. SMITH, COMPLAINANT, *vs.* THE FORT SCOTT, HUMBOLDT AND WESTERN Railroad Company, and the County of Bourbon, State of Kansas, and the County Commissioners of Bourbon County, State of Kansas, defendants. | Bill. |

Humbly complaining, sheweth unto your honor, your orator, Franklin C. Smith, the complainant in this suit, who complains of the Fort Scott, Humbol't, and Western Railroad Company, a corporation organ-
2 ized and doing business in the county of Bourbon and State of Kansas, and the Board of County Commissioners of Bourbon County, and the County of Bourbon, defendants, and says that he, the said complainant, is a citizen of the State of Illinois, and that the said defendant, the Fort Scott, Humboldt and Western Railroad Company is a body corporate created by and organized and existing under the laws of the State of Kansas, and is a citizen of said State of Kansas, and that the said County of Bourbon is a body corporate and politic created by and existing under the laws of the State of Kansas, and that the said County of Bourbon, and the Board of Commissioners of the County of Bourbon, and said county commissioners are citizens of the said State of Kansas; and the said plaintiff further says that in the month of June, A. D. 1871, the said plaintiff and one John Dunn, under the firm-name and style of F. C. Smith & Co., entered into a contract with the late Fort Scott & Allen County Railroad Company, now the Fort Scott, Humbol't and Western Railroad Company, a company duly organized and incorporated under and in pursuance of the statute laws of the State of Kansas, then located and transacting their business at Fort Scott, in Bourbon County, in the State of Kansas, where said road was located as follows, viz: Commencing at Fort Scott, Bourbon County, Kansas; running thence west, north of the Marmaton River, upon the most practicable route, in the general direction of Humboldt, Allen

County, in the State of Kansas, to and beyond the western line of Bourbon County aforesaid, by which contract the said F. C. Smith & Co. obligated themselves to locate, survey, grade, and bridge a railroad bed extending from Fort Scott westerly along and on the north side of the Marmaton River, through the said county of Bourbon, and to the city of Humboldt, in Allen County, State of Kansas, and in all respects complete the grading of said road-bed, and con'tract all nec-
3 essary bridges and culverts therefor, and put the same in condition to receive the superstructure by the first day of July, A. D. 1872.

That in consideration of the covenants and agreements aforesaid, on the part of the said F. C. Smith & Co., the said railroad company, by their duly elected and qualified president and directors, obligated said company to pay over and deliver to the said F. C. Smith & Co., in payment therefor, certain municipal bonds, in the aggregate amounting to the sum of two hundred and seventy-five thousand dollars par value of said bonds, to wit: Bonds of the County of Bourbon, State of Kansas, the sum of one hundred and twenty-five thousand dollars; bonds of the city of Humbol't, in Allen County, State of Kansas, twenty-five thousand dollars par value thereof; bonds of Humbol't Township, in Allen County, State of Kansas, seventy-five thousand dollars par value thereof; bonds of Salem Township, in said Allen County, State of Kansas, twenty-five thousand dollars par value thereof, and bonds of the township of Ellsmore, in said Allen County, twenty-five thousand dollars par value thereof. And it was further provided in said contract that in case the said railroad company failed to obtain the bonds of the said township of Ellsmore, then, in their stead, the said railroad company agreed to pay said F. C. Smith & Co. a like amount of municipal bonds of said Humboldt Township or Humboldt City, or bonds of like character and value, or their cash value in money, and the complainant sheweth that said contract or instrument in writing was in substance and effect and in the words and figures following, to wit:

"Contract and agreement made and executed this 6th day of June, 1871, by and between the Fort Scott and Allen County Railroad Company, State of Kansas, of the first part, and F. C. Smith and
4 John Dunn, partners as F. C. Smith & Co., of Wyoming County, New York, of the second part, witnesseth:

"That the said party of the second part, for and in consideration of the sum of two hundred and seventy-five thousand dollars in bonds of Bourbon County, Kansas, and in bonds of the city of Humboldt, and various townships of Allen County, Kansas, to be received at par by the party of the second part, to be paid at the times and in the various amounts hereinafter mentioned, do hereby stipulate and agree to grade a railroad bed from the city of Fort Scott, Bourbon County, Kansas, beginning at some point to be designated by the party of the first part, on the north or west side of the Marmation River, adjoining said city, and running to and through the city of Humboldt, Allen County, Kansas, to the line of the Missouri & Texas Railway to a point not exceeding one-fourth of one mile from the present depot of said M., K. & T. Railway Co. at said city of Humboldt. To construct good and substantial railroad bridges over and across the Neosho River, and over and across all streams on the line of said Fort Scott and Allen County Railroad; also to construct all necessary culverts, water-courses, ditches, and cattle guards on the line of said road.

"It is stipulated and agreed by the parties hereto that the location of said road shall not vary more than one mile from the route of the pre-

liminary survey of said road, as made by Capt. T. I Hurd, without the consent of the parties of the first part, and shall run not more than one-half mile from Uniontown, nor more than one mile from Marmaton City. That said road-bed shall be, on all embankments four feet high and under, ten feet wide; on all embankments over four feet high and under twelve feet high, twelve feet wide; on all embankments over twelve feet high, fourteen feet wide; all cuts shall be sixteen feet
5 wide. All earths slopes to be one and one-half feet horizontal to one foot vertical. All rock slopes to be one-fourth of one foot horizontal to one foot vertical. Said road-bed to have a maximum grade of not over sixty feet to one mile. All culverts and water courses to be made of rubble masonry, laid dry; cattle-guards of wood.

"It is further stipulated and agreed that said parties of the second part shall defray and pay all expenses of engineering connected with the location and construction of said road bed, bridges, culverts, water-courses, and cattle-guards; that all of said work shall be fully done and completed, in a good and substantial and workmanlike manner, on or before the 30 day of June, 1872. All the culverts, water-courses, ditches, and cattle-guards on said road-bed shall be located and their sufficiency determined by the chief engineer of the party of the first part in connection with the engineer of the parties of the second part, and in case of a difference of opinion between said engineers on any such question, they shall select some competent disinterested third party, who shall determine the matter.

"For and in consideration of the foregoing stipulations and agreements to be done, executed, and performed by said parties of the second part, and the acceptance thereof by the party of the first part, the said party of the first part, its successors and assigns, do hereby stipulate and agree to pay to said party of the second part thirty thousand dollars (in bonds at par) of the city of Humboldt, Kansas, and township of Humboldt, Kansas, upon the completion of said road-bed and its acceptance as aforesaid by the parties of the first part from the Mo., Kan. and Texas Railway Co. line to the line of the Leavenworth, Lawrence and Galveston Railroad Co.'s line, and the completion of the railroad bridge over and across the Neosho River, in accordance with the
6 conditions of this agreement by the said parties of the second part; and the party of the first part hereby agrees to pay to said parties of the second part the further sum of one hundred thousand dollars in bonds (at par) of Bourbon County, Kansas, and seventy thousand dollars in bonds (at par) of Humboldt Township, Kansas, when the said road-bed shall be completed, and the necessary and proper bridges, culverts, water-courses, ditches, & cattle-guards shall be fully built according to the terms of this contract, by the parties of the second part, from the said point in the city of Fort Scott unto the bluffs in the eastern portion of Allen County, on the west side of the Marmaton River, and to pay to said parties of the second part, when the balance of said road-bed, to wit, from the line of said L. L. & Galveston Railroad, in Humboldt Township, Allen Co., K's, to the before-named point on the bluffs in the eastern portion of Allen Co., K's, fully completed and united, according to contract, with all necessary bridges, culverts, water-courses, ditches, & cattle-guards, the further sum of twenty-five thousand dollars in bonds (at par) of Bourbon County, Kan., and at the expiration of six months thereafter the further sum of fifty thousand dollars in township bonds (at par) of township of Allen Co., K's, or Humboldt City bonds, or both, or in lieu thereof bonds of like value

and amounts or the then market value of a like amount of such bonds in cash.

"It is further stipulated & agreed by and between the parties hereto that before the work on said road-bed shall be commenced in the townships of Saline and Ellsmore, Allen County, K's, the said party of the first part shall give to said parties of the second part good and satisfactory security, in the sum of fifty thousand dollars, for the prompt payment of said sum of fifty thousand dollars in bonds (at par) of township of Allen Co., K's, before referred to, or in lieu thereof their market value in cash.

"It is further agreed that if the said parties of the second part
7 desire to receive and take one hundred thousand dollars in bonds (at par) of the township of Humboldt and city of Humboldt at the time that the thirty thousand dollars in bonds, as hereinbefore agreed to be delivered, shall become due and payable, then and in that case the parties of the first part agree that the said one hundred thousand dollars in such city and township bonds shall be delivered to the parties of the second part upon the giving by the said parties last named good and sufficient security, to the satisfaction of the parties of the first part, for the faithful performance of this said contract.

"It is further agreed and stipulated that on said road-bed there shall be no unnecessary curves or grades, and as to the number and extent of its grades it shall be a good average road-bed as compared with other Kansas railroad beds.

"It is further stipulated and agreed by and between the parties hereto that all of the said work shall be fully done and completed by the said party of the second part on or before the said 30th day of June, 1872; and if by reason of failure to complete said work, or any part thereof, any portion of the franchises of said party of the first part shall be lost or forfeited by the party of the first part, said loss or forfeiture shall be borne and inure to said party of the second part, and any such loss shall operate as a payment to the extent of such loss by the party of the first part to the party of the second part of the consideration hereinbefore mentioned and contained. It being hereby expressly agreed and understood by and between the parties hereto that time is of the essence of this contract and agreement.

"In witness whereof the respective parties hereto have executed this contract in duplicate the day and year first above written, the party of the first part by the hands of its president and secretary, attested by its corporate seal under and by virtue of a resolution of the board
8 of directors of said corporation passed June 6, 1871, and the parties of the second part by the hand of F. C. Smith & Co., by F. C. Smith.

(Signed) "JOHN S. REDFIELD,
"*Pres. Fort Scott & Allen Co. R. R. Co.*
[SEAL.] "SAMUEL A. MANLOVE,
"*Secretary of the Fort Scott and Allen Co. R. R. Co.*
"F. C. SMITH & CO.,
"By F. C. SMITH."

[5 cents stamp.]

And the complainant further shows unto the court that soon after the execution and delivery of the aforesaid contract, to wit, on or about the 30th day of June, A. D. 1871, the said John Dunn assigned all his right and interest to and in the rights, benefits, and obligations of said contract to this complainant, and thereupon this complainant assumed

the sole control and management of the business of contracting said road-bed under said contract, and so continued to own and hold the entire interest therein until the same was fully completed by him as hereinafter stated.

And the complainant further showeth unto the court that he faithfully performed the terms and conditions of said contract on his part, and did grade and complete said road-bed provided for in said contract of said railroad from the city of Fort Scott, Bourbon Co., Kansas, at the point designated by said railroad company on the north side of the Marmation River, and running west to & through the city of Humboldt, Allen County, Kansas, beyond the west line of Bourbon County aforesaid, and to the line of the Missouri & Texas Railway to the point designated in said contract, & did fully prepare & complete all the work specified in said contract to be done by said parties of the second part, within the time limited for the performance thereof, and that the same was fully completed on the first day of June, 1872, and that said railroad company, by their said president and directors, signified their approval of the said work and accepted the same, and passed, on the 6th day of June, A. D. 1872, a resolution declaring
9 that this complainant had fully and entirely discharged his obligations undertaken in said contract.

And the complainant further shows unto the court that all the work mentioned in said contract to be by him performed and executed, viz, the grading of said road-bed, constructing all necessary culverts, water courses, ditches, and cattle guards on the line of said road, were each and all performed in a good and workmanlike manner and under the immediate supervision and directions of an engineer appointed and employed by said railroad company for that purpose.

And this complainant further shows unto the court that in part payment of the work and labor by him so performed & materials furnished under and in pursuance of said contract, he received in municipal bonds of the city of Humboldt, Allen County, State of Kansas, twenty-five thousand dollars at par value, and in municipal bonds of the township of Humboldt, in said Allen County, Kansas, seventy-five thousand dollars, par value, and that there now remains due and owing to this complainant by the terms and conditions of said contract for the work and labor so performed and the materials furnished the sum of one hundred and seventy-five thousand dollars, which by said contract was to be paid and discharged by the delivery to this complainant of the above-mentioned municipal bonds of the county of Bourbon, in the sum of $125,000, State of Kansas, and the above-mentioned municipal bonds of the township of Salem, in Allen County, State of Kansas, in the sum of $25,000, and twenty-five thousand dollars in municipal bonds of Ellsmore Township, in said Allen County, State of Kansas, or in their stead municipal bonds of Humboldt Township or Humboldt City bonds, or municipal bonds of like value, or their market value in cash.

And the complainant further shows unto the court that he has made demand upon said railroad company for a compliance with the
10 terms of said written contract, and for the delivery to him of all the aforementioned municipal bonds, and that said railroad company have hitherto utterly failed on their part and have not delivered or paid to this complainant anything whatever except the above-mentioned sum of one hundred thousand dollars of Humboldt Township and Humboldt City bonds, viz, $25,000 of Humboldt City bonds & $75,000 of Humboldt Township bonds.

And the complainant further complains against the Board of County

Commissioners of Bourbon County, in said State of Kansas, and said defendants, & says that the said county commissioners, having in view the material growth and financial prosperity of said county of Bourbon, State of Kansas, and being desirous of procuring the location and construction of a railroad running from Fort Scott, the county seat and commercial center of said county of Bourbon, westerly on the north side of Marmaton River and to the city of Humboldt, in Allen County, State of Kansas, and the said county commissioners, then believing that the construction of said railroad would add largely to the growth of the city of Fort Scott, and that it would be the means of securing to the merchants and business men of said city a large trade from persons living along the line of said projected railroad and from the country at the west of and in the vicinity of said city of Humboldt and the county of Allen, and also that said projected railroad would furnish another outlet to the large coal-mining interests of said county of Bourbon located in the vicinity of Fort Scott, and thus secure a more extended market for said coal interests of said city & county, and thereby cause its rapid growth and consequently large benefits to the residents and property owners thereof, and in furtherance of said enterprise and to carry the wishes of the inhabitants of said county into practical effect, the board of county commissioners of said county of
11 Bourbon, in pursuance of the statute in such case made and provided, on the 13th day of October, A. D. 1870, passed a resolution in words and import as follows, to wit: That there be subscribed in the name and for the benefit of the county of Bourbon, in the State of Kansas, one hundred and fifty thousand dollars, to the capital stock of any railroad company now organized, or that shall be organized hereafter, that shall construct a railroad commencing at the city of Fort Scott, in the county and State aforesaid, running from thence west north of the Marmaton River, upon the most practicable route in the general direction of Humboldt, Allen County, Kansas; and that the bonds of said county be issued to said company for the payment of said subscription, said bonds to be payable within thirty years from the date thereof and bearing interest, payable semi-annually, at the rate of seven per cent. per annum; provided that said bonds should not be issued until the question should be submitted to a vote of the qualified electors of the county of Bourbon aforesaid, and should have received a majority of the votes cast upon said proposition in favor thereof, in pursuance of the provisions of the statute passed by the legislature of the State of Kansas in such cases made and provided; and that said question should be submitted to said electors at a special election, to be held at the usual places of holding elections in said county, on Tuesday, the 24th day of August, A. D. 1869. At the said election the vote should be cast "for railroad bonds," and "against railroad bonds"; and if it should appear, upon a canvass of the votes cast at said election by the proper officers according to law, that a majority of the votes cast upon said question were in favor of the said subscription, then the above order should be carried into practical operation by the issuing the bonds to said com-
pany whenever the county commissioners of Bourbon County
12 were satisfied that the bonds therein provided for, with the other resources of said company, should be sufficient and adequate to complete the construction of the road bed ready for the iron from the city of Fort Scott to the west line of Bourbon County.

And complainant further shows unto the court that a notice was duly given to the people and legal voters of said county that said election would be held on the 24 day of August aforesaid; that said election was

duly called and held on that day, and that on that day a vote was duly had at all the proper voting precincts and places in said county, and that said election was held in accordance with the forms of law in such cases provided, and that the votes were cast in favor of and against said proposition; and upon a correct canvass of said votes by the proper officers whose duty it was to make such canvass, it was found (and such was the fact as to said election) that a majority of all the votes cast at said election as aforesaid were in favor of said proposition, & that a majority of the legal voters of said county of Bourbon were in favor of, & at said election voted in favor of, said subscription and the taking of stock in a railroad located according to the conditions expressed in the resolutions of the said county commissioners.

And petitioner further shows unto the court that after the result of said election had been announced, and in the month of October, A. D. 1870, a railroad company was duly incorporated and organized, under and in pursuance of the general statute laws of the State of Kansas, for the purpose of constructing and operating a railroad over and upon the route designated in said resolution of said county commissioners, to wit, west from the said city of Fort Scott, in and through Bourbon County, Kansas, and on the north side of the Marmaton River to the city of Humboldt, in Allen County, Kansas, which said incorporation was named and designated as the "Fort Scott and Allen County
13 Railroad"; and said railroad company thereupon made application to said county commissioners of Bourbon County for the aforesaid subscription to be made to their aforesaid company, viz, a subscription of one hundred and fifty thousand dollars to their capital stock, whereupon the said county commissioners, after consideration, on the 13th day of October, 1870, passed the following resolution, to wit:

Whereas upon a proposition submitted to the electors of Bourbon County, Kansas, on Tuesday, the 24th day of August, 1869, the board of county commissioners of said county were authorized to subscribe the amount of one hundred and fifty thousand dollars to the capital stock of any railroad running westerly from Fort Scott, Kansas, through the county of Bourbon, on the north side of the Marmaton River, in the general direction of Humboldt, Allen County, Kansas, and to issue the bonds of the said county for the payment of said subscription, said bonds to be payable in thirty years from the date of issue and bearing interest, payable semi-annually, at seven per cent. per annum.

Now, therefore, it is ordered by the board of county commissioners of Bourbon County, Kansas, that Joseph S. Emert, of Bourbon County, Kansas, be, and is hereby, appointed subscription agent for Bourbon County, Kansas, and is hereby authorized and directed to subscribe for and in the name of Bourbon County, Kansas, one hundred and fifty thousand dollars to the capital stock of the Fort Scott and Allen County Railroad Company; yet upon this express condition, that said company or their assigns shall complete the construction of their road-bed, ready for the iron, from Fort Scott to the western line of Bourbon County, Kansas, by the 1st day of July, 1872; and said resolution was thus attested, viz: Witness our hands this 13th day of October, A. D. 1870.

(Signed) D. GARDNER,
*Chairman.*
H. S. RATH,
DAVID R. COBB,
*Commissioners.*

And the complainant further shows unto the court that the
14 said Joseph S. Emmert, subscription agent, appointed as aforesaid, on the day of , and by virtue of the authority so conferred upon him by said board of county commissioners, proceeded to and did make the subscription upon the books of said company of one hundred and fifty thousand dollars to the capital stock of the said Fort Scott and Allen County Railroad Company for and in behalf of said county and in the name of said county.

And the petitioner further shows unto the court that, in pursuance of the laws of Kansas, the township of Humboldt, in Allen County, Kansas, through her authorized agent, subscribed to the capital stock of said railroad company seventy-five thousand dollars, to be paid in the bonds of said township; and also the city of Humboldt, in said county of Allen, subscribed twenty-five thousand dollars, to be paid in the municipal bonds of said city; and the township of Salem, in said Allen County, Kansas, also subscribed $25,000.00 to the capital stock of said railroad company, to be paid in the bonds of said township. And the complainant shows unto the court that the aforesaid subscriptions by the municipal corporations above mentioned constituted the entire capital of said railroad company, save the small sums subscribed by individuals, not to exceed the sum of ten thousand dollars, very little of which was paid.

And the complainant further shows unto the court that, in pursuance of the aforesaid subscriptions to the capital stock of said railroad company, the said several municipal corporations became shareholders in said railroad company, and as such entitled to vote in the election of its officers, and, through the directors so chosen, to have a voice in the control and management of said road; and the said county commissioners of said county of Bourbon, State of Kansas, selected and appointed several citizens of said county of Bourbon to be present at and attend the meetings of the stockholders of said railroad company,
15 and to cast the vote of said county of Bourbon at such meetings according to the interest therein of said county by reason of said subscription; and that said county commissioners of said county at the election of officers of said railroad company, by their agent duly appointed for that purpose, presented the names of several citizens of said county whom they desired to represent said county in the board of directors of said railroad company; that said persons so selected were duly elected and qualified as such directors of said railroad company, and after they were so elected and qualified as aforesaid they met with said board of directors of said railroad company, and had a large influence and the controling interest therein, and assisted and advised in the business management of said railroad company from the time the said subscription was made to the capital stock of said railroad company as aforesaid up to the commencement of this suit.

And the complainant, your orator, further shows unto the court that subsequent to making said subscription to the stock of said company, as aforesaid, and to the election of Samuel Manlove, Benjamin McDonald, John Stewart, E. M. Hatch, and others, whose names are to your orator unknown, to represent said County of Bourbon in said board of directors as aforesaid, the said county commissioners, by a resolution of their said board, passed and recorded among the records of their proceedings as the board of county commissioners of said County of Bourbon, State of Kansas, July 28, 1871, ratified and affirmed all their acts and proceedings respecting the making of said subscription to the capital stock of said railroad company and the appointment of the said directors of said

railroad company, and by said resolution repledged the good faith of said county of Bourbon in the making said subscription aforesaid, and declared their intention to conform to the terms of said subscription and the conditions of the vote of the electors of said county, whereby they were authorized to take stock in said railroad company, as aforesaid. The resolution of said board, passed as aforesaid, is in the
16 words and figures following, to wit:

Whereas the board having this day been waited on by parties representing the Fort Scott and Allen County Railroad Company, with a request for action on the part of the board relative to the issuing the bonds voted by the people on the 24th day of August, 1869, and it appearing to the board that considerable progress has been made in the work upon said railroad in this county, it is therefore ordered that the bonds aforesaid be prepared as soon as the same can be lithographed, and that they be laid in the fire-proof safe in the vault attached to the treasurer's office, with the signature of the chairman only affixed to all the bonds and coupons, to wait further action by the board.

And your orator further shows unto the court that he entered into the said within contract for the grading of said railroad bed as aforesaid with the said railroad company at the solicitation of the president & directors of said railroad company (of which board the directors representing the said county of Bourbon had the controling influence), and at the solicitation of the said county commissioners of said county of Bourbon, who assured this complainant that the people of said county very much desired the building of said railroad, and that the bonds of said county were legally voted, and would be delivered to said railroad company so that said company could perform the stipulations of the contract, as aforesaid, with the complainant, and further, that they, the said county commissioners, were acting in entire good faith, and that your complainant relied on the good faith of said county commissioners at the time he entered into said contract for the grading of said road, as they, the said county commissioners, were apprised and very well knew that said railroad company had little or nothing wherewith to pay for the large outlay necessary to grade said railroad bed, except the municipal bonds above mentioned, and at the time when the said
17 contract for the grading of said road bed was made by the complainant with the president and directors of said railroad company, the persons who were chosen, elected, and qualified directors of said company for the county of Bourbon, by reason of the said subscription to the capital stock of said company, as aforesaid, and the county commissioners of said county of Bourbon were present and assisting, advising, and consenting to the making of said contract, & thereby affirming and ratifying all the previous actings & doings of said county commissioners respecting the making of said subscriptions, and repledging the faith of said county of Bourboun to the issuing and delivery of the bonds of said county in payment of said subscription and in payment to your complainant for the grading of said railroad bed.

Your orator further shows and alleges that he entered into said contract above mentioned with said railroad company, relying upon the representations frequently and repeatedly made to him by said commissioners of said county of Bourbon that the subscription of said county to the capital stock of said company had been legally made, and that the bonds of said county would be issued therefor & transferred to him whenever said road bed should be completed in accordance with the provisions of said contract, and that if he had ever received the

slightest intimation that this would not be done, he would never have entered into said contract or performed said work.

And your orator further shows unto the court in this behalf that after the making of said contract, and at divers times during the performance thereof, between the 6th day of June, A. D. 1871, and the 6th day of June, A. D. 1872, the said board, president, and directors of the Fort Scott and Allen County Railroad Company aforesaid had numerous meetings for the purpose of transacting business incident to the constructing of said road bed and carrying into effect the object of said company and the completion of said railroad, at all of which meetings the said directors representing said Bourbon County were present
18 and so took part in all the transactions of said board of directors as the representatives and agents of said county.

And your orator further shows unto the court that the sole and only inducement to him to take the said contract and make the large outlay of money to execute and perform the same was the pledged faith of said county of Bourbon, in connection with that of the other municipal corporation above mentioned, and their promise to pay up their aforesaid subscriptions to the capital stock of said railroad company, and to issue and deliver their aforesaid bonds to said railroad company as they in good faith and by the terms and conditions of their subscription ought to do.

Your orator further shows unto the court that it was well known to all the inhabitants, citizens and legal voters of said county of Bourbon, while your orator was engaged in the performance of said contract and long before the completion thereof, that said work was being done and moneys expended by your orator upon the faith that said county had duly subscribed ($150,000) one hundred and fifty thousand dollars to the capital stock of said company, and upon the assurance that it would issue its bonds therefor upon the completion of said contract, and your orator avers that said county commissioners procured said work to be done and said expenditures to be made by your orator by representing to your orator that said election had been legally held and said capital stock of said railroad company legally subscribed for by said county, and that the bonds of said county would be issued in payment of said stock and duly given to your orator when said contract should be completed by your orator, and no objection or opposition was ever made thereto by any of the inhabitants, property owners, or legal voters of said county.

And your orator further shows unto the court in this behalf that he trusted and relied in the pledged faith of said county of Bourbon as aforesaid, and the assurance of said county commissioners and the directors representing said county of Bourbon as her agents as
19 aforesaid, and proceeded to the performance of his stipulations in said contract, and did entirely complete the same by the first day of June, 1872, and that said road-bed was on the 1st day of June, A. D. 1872, ready for the iron, and that the county commissioners of said county of Bourbon are entirely without excuse for the non-performance of their stipulations respecting the delivery of the bonds of said county as aforesaid to the said railroad company or to the complainant, yet notwithstanding the said commissioners have hitherto wholly neglected and refused so to do; and the complainant shows that after he had performed and fully completed the grading of said road to the west line of said county and also to the city of Humboldt, in the county of Allen, in said State of Kansas, the said board of county commissioners, notwithstanding the vote of the legal electors of said county on the 24th

day of August, A. D. 1869, authorizing said county commissioners to issue said bonds to said railroad company when the resources of said company in connection with the bonds of said county were sufficient to complete the grading of said railroad bed ready for the iron to the west line of said county of Bourbon, and notwithstanding the subscription made as aforesaid by the said Joseph S. Emert, agent as aforesaid of said county, for and in behalf of said county, and notwithstanding that the said railroad bed was entirely completed not only to the west line of said county of Bourbon, but to the city of Humboldt, a distance of over twenty-five miles over and above the requirements of the vote of the electors of said county as aforesaid, and the subscription made as aforesaid, yet the said county commissioners of said county of Bourbon, in bad faith towards the said railroad company, attempted to impose additional and burdensome conditions upon the issue of the bonds of said county not contained in the proposition voted on by the electors of said county at the election aforesaid held August 24th, 1869, and not contained in the resolution of said board of county commis-
20 sioners, passed as aforesaid on the 13th day of October, A. D. 1870, nor in the resolution of said board authorizing the subscription to the capital stock of the said railroad company.

And the complainant further shows unto the court that the municipal bonds of the said townships of Salem and Ellsmore, in said county of Allen, could not be lawfully issued and delivered by the officers of said townships nor by the commissioners of said county of Allen until said railroad was completed, ironed, equipped, and in running order.

And the complainant further shows in this behalf that the bonds of the township of Ellsmore, in said county of Allen, mentioned in said contract for the grading of said road at the time said contract was made, had not been authorized by a vote of the electors of said township, and because thereof and because the bonds of said township of Ellsmore when they should be authorized by the electors and the bonds of the said township of Salem could not be delivered to the said railroad company until said railroad should be entirely finished, equipped, and in running order, and therefore the said railroad company could not deliver the bonds of said townships to the complainant, as by their said contract they had agreed to do. It was therefore provided and stipulated in said contract that the bonds of said township of Salem, in said county of Allen, and the contemplated bonds of the township of Ellsmore, in said county of Allen, should be delivered to the said F. C. Smith & Co., within six months next after the completion of the work mentioned in said contract, and it was further provided and stipulated in that behalf in said contract that before any work was done or commenced on the grading of said road-bed through the said township of Salem and Ellsmore, the said president and directors "should give to the said F. C. Smith & Co. good and satisfactory security there-
21 for, in the sum of fifty thousand dollars, for the prompt payment of said sum of fifty thousand dollars in bonds (at par) of township of Allen County, Kansas, before refer'ed to, or in lieu thereof their market value in cash."

And the complainant avers that when he was ready and about to commence work on the grading of said road in said township, he notified the said railroad company thereof and demanded the security above mentioned, and that the president and directors of said company procrastinated and delayed the giving of the same from time to time upon various pretexts, and finally utterly failed and neglected and refused

to furnish the same to the complainant or to the said F. C. Smith & Co. any security whatever.

And the complainant further shows unto the court that more than three years have elapsed since the completion of the work aforesaid under said contract, and the payment therefore has been due and undischarged and unpaid, yet the said railroad company, the president and directors, have taken no step nor have they instituted any legal proceedings whatever to enforce the payment to them of the aforesaid subscription to the capital stock of said railroad company by said county of Bourbon, nor to compel the issuing and delivery of the aforesaid bonds of said county of Bourbon in discharge of said subscription.

And the complainant further shows unto the court that said railroad company is utterly insolvent and has no means or property except the right of way and the road-bed constructed and built thereon by the complainant, and the aforesaid claims against the aforesaid municipal corporations for their several subscriptions to the capital stock of said railroad company. And your orator charges that he is entitled to receive from said county of Bourbon & from the county commissioners of said county the bonds of said county in the sum of $125,000, according
22 to the stipulations in said contract with said railway company, & in pursuance of the vote of the legal voters of said county and the action of said commissioners, and in the further and additional sum of $25,000 also due to your orator under said contract, which said company has failed to pay your orator, and which additional sum of $25,000 was authorized by the vote of the legal voters of said county, as well as by the action and vote of said county commissioners after said election was held. And your orator avers that a judgment alone against said railroad company would afford him no relief whatever in the premises.

Forasmuch, therefore, as your orator is remediless in a court of law in the premises and can only have relief in a court of equity, where matters of this nature are properly cognizable, your orator prays that an order or decree of this court may be made against said railroad company, and the president and directors thereof, ordering them to assign to your petitioner their claim against the aforesaid county of Bourbon, and also their claim against the aforesaid township of Salem' viz, the county of Bourbon of $150,000, and the township of Salem twenty-five thousand dollars, and that said Bourbon County be directed and decreed to cause said county bonds to be issued and delivered to your orator or to pay to your orator said indebtedness of $150,000, and that the said commissioners of said county of Bourbon may be ordered and decreed by this honorable court to sign and issue the bonds of said county of Bourbon in the sum of one hundred and fifty thousand dollars, payable in thirty years from the date thereof and from the 1st day of July, A. D. 1872, when said work was done and said bonds should have been issued, with semi-annual interest coupons attached, payable in New York, in accordance with the terms of the aforesaid subscription to
the capital stock of said railroad company, payable to your ora-
23 tor, said complainant, and that they deliver said bonds to your orator in satisfaction and payment of a corresponding amount of the indebtedness due to him by said railroad company under said contract.

And that your orator may have such other and further relief in the premises, or other and different relief, as to the court shall seem just. May it please the court to grant process against the said The Fort Scott, Humboldt & Western Railroad Company, & against the said County of Bourbon, and the said The County Commissioners of Bourbon County,

defendants herein, commanding them to appear and answer the premises by the next term of this honorable court, and your orator will ever pray, &c.

F. C. SMITH.
MILLER & FROST &
G. C. LAUPHEN,
*Solicitors for Complainant.*

J. H. GILLPATRICK,
*Of Counsel.*

(Endorsed:) No. 1361. Franklin C. Smith vs. The Fort Scott, Humboldt & Western Railroad Company et al. Bill. Filed August 7, 1875. A. S. Thomas, clerk.

*Bond.*

UNITED STATES OF AMERICA,
*District of Kansas, ss:*
Circuit court, November term, A. D. 1875.

FRANKLIN C. SMITH
*vs.*
THE FORT SCOTT, HUMBOLDT & WESTERN Railroad Company, and the County of Bourbon, & the County Commissioners of Bourbon County.

We enter ourselves security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby
24 agree and stipulate that execution may issue against our property for any costs taxed against him.

Dated this 5th day of June, A. D. 1875.

F. C. SMITH.
JOHN C. STEWART.
WILLIAM C. WHITNEY.
G. C. LAUPHEN.

(Endorsed:) Gen. No. 1361. Circuit court United States, district of Kansas. Franklin C. Smith vs. The Fort Scott, Humboldt & Western R. R. et al. Bond for costs. Filed August 7, A. D. 1875. A. S. Thomas, clerk. Approved. A. S. Thomas, clerk.

And on this day, to wit, the 7th day of August, A. D. 1875, the clerk of said court issued a writ of chancery subpœna for the defendants in the above-entitled suit, which said writ of chancery subpœna, with the endorsements and the U. S. marshal's return thereon, is in the words and figures following, to wit:

*Chancery subpœna.*

UNITED STATES OF AMERICA,
*District of Kansas, ss:*

The United States of America to the Fort Scott, Humboldt & Western Railroad Company, and the County of Bourbon, State of Kansas, and the County Commissioners of Bourbon County, State of Kansas, greeting:

We command you and every of you, that you appear before our judge of our circuit court of the United States of America *that you appear before our judge of our circuit court of the United States of America*

for the district of Kansas, at the city of Topeka, in said district, on the first Monday in the month of September next, to answer the bill of complaint of Franklin C. Smith, this day filed in the clerk's office of said court in said city of Topeka, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

25 To the marshal of the district of Kansas to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of Topeka, in said district, this seventh day of August, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] A. S. THOMAS, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at the city of Topeka, aforesaid, on or before the pay to which the above writ is returnable, the complaint will be taken against them as confessed and a decree entered accordingly.

A. S. THOMAS, *Clerk.*

(Endorsed:) No. 1361. Circuit court United States, district of Kansas. Franklin C. Smith vs. The Fort Scott, Humboldt & Western Railroad Company et al. Chancery subpœna. Returnable to rule day, first Monday in September, A. D. 1875. A. S. Thomas, clerk. Miller & Frost, & G. C. Lauphen, and J. W. Gillpatrick, comp't's sol.

*U. S. marshal's return.*

DISTRICT OF KANSAS, *ss:*

Received the within writ August the 7th, 1875, and executed the same as follows, to wit: Served on the within-named defendant, the Fort Scott, Humboldt & Western Railroad Company, at Bourbon Co., State & district of Kansas, on the 16th day of August, A. D. 1875, by delivering to J. S. Redfield, Edward Jones, and E. M. Hulett, each of them personally, a true & certified copy of this writ with all the endorsements thereon. The said J. S. Redfield being then & there the president, and said Edward Jones & E. M. Hulett, each of them, directors of said defendant, the Fort Scott, Humboldt & Western Railroad Company; and served same on within-named defendant, County of Bourbon, State of Kansas, on the 14th day of August, 1875, at the place above-mentioned, by delivering to J. H. Brown, personally, a like

26 copy of this writ, he, said J. H. Brown, being then & there the clerk of said defendant, County of Bourbon, State of Kansas, and the person on whom service is directed to be made; and served same on the within-named defendant, County Commissioners of Bourbon County, State of Kansas, on the 18th day of August, A. D. 1875, at the place above mentioned, by delivering to F. H. Richards, B. R. Wood, & Geo. Mason, each of them personally, like copies of this writ; they, the said F. H. Richards, B. R. Wood, & Geo. Mason, being the members of and constituting the said defendant, the County Commissioners of Bourbon County, State of Kansas.

W. S. TOUGH,
*U. S. Marshal,*
By C. T. RUCKER,
*Deputy.*

Marshal's fees, $26.00.
Filed August 28, A. D. 1875.

A. S. THOMAS, *Clerk.*

And on this day, to wit, the 2d day of September, 1875, the said defendants, by McComas and McKeighan, their solicitors, filed in the clerk's office of said court their appearance in the above-entitled suit, which said appearance with the endorsements thereon is in the words and figures following, to wit:

*Appearance of defendants.*

In the circuit court of the United States for the district of Kansas.

FRANKLIN C. SMITH
*vs.*
THE FORT SCOTT, HUMBOLDT AND WESTERN Railroad Company, the County of Bourbon, and the County Commissioners of Bourbon County.

The clerk of this court will please enter our appearance as solicitors for the defendants in the above-entitled cause.

Your, &c.,

McCOMAS & McKEIGHAN,
*Solicitors for the Defendants.*

(Endorsed:) F. C. Smith vs. The Fort Scott, Humboldt and Western R. W. Co. et al. Appearance. Filed Sep. 2, 1875. A. S. Thomas, clerk.

27 And thereupon, on the same day, the clerk of said court made an entry in the order book of said court in the words and figures following, to wit:

*Order-book entry.*

FRANKLIN C. SMITH
*vs.*
THE FORT SCOTT, HUMBOLDT, AND WESTERN Railroad Company, the County of Bourbon, and the County Commissioners of Bourbon County.

And now come the Fort Scott, Humboldt and Western Railroad Company, the County of Bourbon, and the County Commissioners of Bourbon County, the defendants in the above-entitled case, by McComas & McKeighan, their solicitors, and enter their appearance in said entitled case and to the complainant's bill of complaint therein filed.

And on this day, to wit, the 2d day of September, 1875, the said defendants, by McComas & McKeighan, their solicitors, filed in the clerk's office of said court their demurrer in the above-entitled suit, which said demurrer, with the endorsements thereon, is in the words and figures following, to wit:

*Demurrer.*

In the circuit court of the United States for the district of Kansas.

FRANKLIN C. SMITH
*vs.*
THE FORT SCOTT, HUMBOLDT & WESTERN Railroad Company, the County of Bourbon, and the County Commissioners of Bourbon County.

The joint and several demurrer of the Fort Scott, Humboldt & Western Railroad Company, the County of Bourbon, and the County Commissioners of Bourbon County to the bill of complaint of Franklin C. Smith, complainant.

28 These defendants, respectively, by protestation, not confessing or acknowledging all of the matters and things in the said bill of complaint to be true in manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show that the said complainant hath not by his said bill made such a case as entitles him in a court of equity to any relief from or against these defendants, or either of them, and that the said bill is wholly insufficient in law. Wherefore these defendants do severally demur to the said bill, and to all the matters and things therein contained, and humbly pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, and pray hence to be dismissed, with their reasonable costs in this behalf sustained.

McCOMAS & McKEIGHAN,
*Sol. for said Defendants.*

I, H. C. McComas, certify that, in my opinion, the foregoing demurrer of these defendants to the bill of complaint of the complainant is well founded in law and proper to be filed in the said cause.

H. C. McCOMAS,
*Sol., and of Counsel for the said Defendants.*

UNITED STATES OF AMERICA,
*District of Kansas, ss :*

John S. Redfield, president of the said F't Scott, Humboldt & Western Railway Company, and B. R. Wood, chairman of the Board of County Commissioners of Bourbon County, being severally duly sworn, each for himself doth say that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purposes of delaying the said suit or any proceeding therein.

B. R. WOOD,
*Ch'm Board of Commissioners.*
JOHN S. REDFIELD,
*Pres. of F. S., H. & W. R. R. Co.*

Sworn to and subscribed before me this 1st day of September,
29 A. D. 1875.
[SEAL.]

JAMES H. SALLEE,
*Notary Public.*

(Endorsed:) No. 1361. F. C. Smith vs. The Fort Scott, Humboldt and Western R. W. Co. et al. Demurrer. Filed Sep. 2, 1875. A. S. Thomas, clerk.

And on this day, to wit, the 30th day of November, 1875, the said defendants, by McComas and McKeighan, their solicitors, filed in the clerk's office of the said court their demurrer in the above-entitled suit, which said demurrer, with the endorsements thereon, is in the words and figures following, to wit:

*Demurrer.*

In the circuit court of the United States, district of K's.

FRANKLIN C. SMITH, COMPLAINANT,
*vs.*
THE FORT SCOTT, HUMBOL'T AND WESTERN Railroad Company, and the County of Bourbon, State of Kansas, and the County Commissioners of Bourbon County, State of Kansas, defendants.

The joint and several demurrers of the Fort Scott, Humbol't & Western Railroad Company, the County of Bourbon, and the County Commissioners of Bourbon County, State of Kansas, to the bill of complaint of Franklin C. Smith.

These defendants, respectively, by protestation, not confessing or acknowledging all of the matters and things in the said bill of complaint to be true in manner and form as the same are therein set forth and alleged, for new and additional grounds of demurrer to those set forth in the demurrer on file, shows to the court that this court ought not to proceed farther in hearing of said bill of complaint, because it appears from said bill that this court has no jurisdiction of the parties to this suit, nor either of them.

30 2d. And for further ground of demurrer to said bill of complaint, said defendants, respectively, show to the court that it appears from said bill of complaint that the same is exhibited against said defendants jointly for several distinct matters and causes, in many whereof, as appears by the said bill, these defendants are not jointly interested, by reason of which distinct matters the said bill is drawn out to a considerable length, and these defendants are each compelled to take a copy of the whole thereof, and by joining distinct matters together, which do not depend on each other in the said bill, the pleadings, orders, and proceedings will in the progress of the said suit be intricate and prolix, and these defendants be severally and jointly put to unnecessary charges in taking copies of the same, although several parts in no way relate to or concern them jointly.

McCOMAS & McKEIGHAN,
*Solicitors and of Counsel for Defendant.*

I certify that, in my opinion, the foregoing demurrer to the foregoing bill of complaint is well founded in law and proper to be filed in the foregoing cause.

J. E. McKEIGHAN,
*Solicitor and of Counsel for Defendants.*

J. E. McKeighan, being duly sworn, deposes and says that he has read the foregoing demurrer, and that the same is not interposed for delay; that he is one of the solicitors of defendants, and none of said defendants are in attendance, nor no officer thereof, to make this affidavit.

J. E. McKEIGHAN.

Subscribed and sworn to before me this 30th day of November, 1875.
A. S. THOMAS, *Clerk.*

(Endorsed:) No. 1361. Franklin C. Smith vs. S. W. H. R. R. Co. & County of Bourbon, &c. Demurrer. Filed Nov. 30, 1875. A. S. Thomas, clerk.

31 And on this day, to wit, the 2d day of December, 1875, in the November term of said court, in the record of the proceedings in the above-entitled suit is the following entry in the words and figures following, to wit:

*Journal entry.*

THURSDAY, *December* 2, 1875.

FRANKLIN C. SMITH
*vs.*
THE FORT SCOTT, HUMBOLDT AND WESTERN Railroad et al. } 1361.

Now comes the complainant in this suit, by Miller & Frost, his solicitors, and also comes the defendants, by McComas & McKeighan, their solicitors, and thereupon this suit came on to be heard upon the defendants' demurrer to complainant's bill, which, being argued by counsel and considered by the court, is sustained, and thereupon it is ordered by the court that said plaintiff heave leave to amend his bill herein if he so elects by January rule day; and it is further ordered by the court that this suit be and the same is hereby continued to the next term of this court.

And on this day, to wit, the 24th day of December, 1875, the said complainant, by his solicitors, filed in the clerk's office of the said court his amended bill in the above-entitled suit, which said amended bill, with the endorsements thereon, is in the words and figures following, to wit:

*Amended bill.*

UNITED STATES OF AMERICA,
*District of Kansas, ss:*

In the circuit court of the United States for the district of Kansas.
November term, A. D. 1875.

FRANKLIN C. SMITH, COMPLAINANT,
*vs.*
THE FORT SCOTT, HUMBOL'T, & WESTERN Railroad Company, and the County
32 of Bourbon, State of Kansas, and the County Commissioners of Bourbon County, State of Kansas, defendants. } Amended bill.

Humbly complaining, sheweth unto your honors, your orator, Franklin C. Smith, the complainant in this suit, who, leave of the court being first had & obtained, amends his original bill in this suit and complains of the Fort Scott, Humbol't, and Western Railroad Company, a corpora-

tion organized and doing business in the county of Bourbon and State of Kansas, and the Board of County Commissioners of Bourbon County, and the county of Bourbon, defendants, and says that he, the said complainant, is a citizen of the State of Illinois, and that the said defendant the Fort Scott, Humbol't and Western Railroad Company is a body corporate created by and organized and existing under the laws of the State of Kansas, and is a citizen of said State of Kansas, and that the said County of Bourbon is a body corporate and politic created by and existing under the laws of the State of Kansas, and that the said County of Bourbon and the Board of Commissioners of the County of Bourbon and said county commissioners are citizens of the said State of Kansas; and the said complainant further says that in the month of June, A. D. 1871, the said plaintiff and one John Dunn, under the firm name and style of F. C. Smith & Co., entered into a contract with the late Fort Scott & Allen County Railroad Company, now the Fort Scott, Humbol't, and Western Railroad Company, a company duly organized and incorporated under and in pursuance of the statute laws of the State of Kansas, then located and transacting their business at Fort Scott, in Bourbon County, in the State of Kansas, whose railroad was located as follows, viz: Commencing at Fort Scott, Bourbon County, Kansas, running thence west, north of the Marmaton River, upon the most practi-
33 cable, route, in the general direction of Humbol't, Allen County, in the State of Kansas, to and beyond the western line of Bourbon County, aforesaid, by which contract the said F. C. Smith & Co. obligated themselves to locate, survey, grade, and bridge a railroad bed extending from Fort Scott westerly along and on the north side of the Marmaton River through the said county of Bourbon and to the city of Humbol't, in Allen County, State of Kansas, and in all respects complete the grading of said road bed and construct all necessary bridges and culverts therefor and put the same in condition to receive the superstructure by the first day of July, A. D. 1872.

That in consideration of the covenants and agreements aforesaid on the part of the said F. C. Smith & Co. the said railroad company, by their duly elected and qualified president and directors, obligated said company to pay over and deliver to the said F. C. Smith & Co., in payment therefor, certain municipal bonds, in the aggregate amounting to the sum of two hundred and seventy-five thousand dollars, par value of said bonds, to wit: Bonds of the county of Bourbon, State of Kansas, the sum of one hundred and twenty-five thousand dollars; bonds of the city of Humbol't, in Allen County, State of Kansas, twenty-five thousand dollars, par value thereof; bonds of Humbol't Township, in Allen County, State of Kansas, seventy-five thousand dollars, par value thereof; bonds of Salem Township, in said Allen County, State of Kansas, twenty-five thousand dollars, par value thereof; and bonds of the township of Ellsmore, in said Allen County, twenty-five thousand dollars, par value thereof; and it was further provided in said contract that in case the said railroad company failed to obtain the bonds of the said township of Ellsmore, then, in their stead, the said railroad com-
34 pany agreed to pay said F. C. Smith & Co. a like amount of municipal bonds of said Humbol't Township or Humbol't City, or bonds of like character and value, or their cash value in money.

And the complainant showeth that said contract or instrument in writing was in substance and effect and in the words and figures following, to wit:

"Contract and agreement, made and executed this 6th day of June, 1871, by and between the Fort Scott and Allen County Railroad Com-

pany, State of Kansas, of the first part, and F. C. Smith and John Dunn, partners as F. C. Smith & Co., of Wyoming County, New York, of the second part, witnesseth:

That the said party of the second part, for and in consideration of the sum of two hundred and seventy-five thousand dollars in bonds of Bourbon County, Kansas, and in bonds of the city of Humbol't and various townships of Allen County, Kansas, to be received at par by the party of the second part, to be paid at the times and in the various amounts hereinafter mentioned, do hereby stipulate and agree to grade a railroad bed from the city of Fort Scott, Bourbon County, Kansas, beginning at some point to be designated by the party of the first part on the north or west side of the Marmaton River, adjoining said city, and running to and through the city of Humbol't, Allen County, Kansas, to the line of the Missouri & Texas Railway to a point not exceeding one-fourth of one mile from the present depot of said M., K. & T. Railway Co., at said city of Humbol't; to construct good and substantial railroad bridges over and across the Neosho River, and over and across all streams on the line of said Fort Scott and Allen County Railroad; also to construct all necessary culverts, water courses, ditches, and cattle guards on the line of said road.

"It is stipulated and agreed by the parties hereto that the location of said road shall not vary more than one mile from the route of the
35 preliminary survey of said road as made by Capt. T. J. Hurd without the consent of the parties of the first part, and shall run not more than one-half mile from Uniontown nor more than one mile from Marmaton City.

"That said road-bed shall be on all embankments four feet high and under, ten feet wide; on all embankment over four feet high and under twelve feet high, twelve feet wide; on all embankments over twelve feet high, fourteen feet wide. All cuts shall be sixteen feet wide. All earth slopes to be one and one-half feet horizontal to one foot vertical. All rock slopes to be one-fourth of one foot horizontal to one foot vertical. Said road-bed to have a maximum grade of not over sixty feet to one mile. All culverts and water-courses to be made of rubble masonry, laid dry. Cattle-guards of wood.

"It is further stipulated and agreed that said parties of the second part shall defray and pay all expenses of engineering connected with the location and construction of said road-bed, bridges, culverts, water-courses, and cattle-guards. That all of said work shall be fully done and completed, in a good and substantial and workmanlike manner, on or before the 30th day of June, 1872. All the culverts, water-courses, ditches, and cattle-guards on said road-bed shall be located and their sufficiency determined by the chief engineer of the party of the first part in connection with the engineer of the parties of the second part, and in case of a difference of opinion between said engineers on any such question they shall select some competent, disinterested third party, who shall determine the matter.

"For and in consideration of the foregoing stipulations and agreements, to be done, executed, and performed by said parties of the second part, and the acceptance thereof by the party of the first part, the said party of the first part, its successors and assigns, do hereby
36 stipulate and agree to pay to said party of the second part thirty thousand dollars in bonds at par of the city of Humbol't, Kansas, and township of Humbol't, Kansas, upon the completion of said road-bed and its acceptance as aforesaid by the parties of the first part, from the Mo., Kan. and Texas Railway Co. line to the line of the Leaven-

worth, Lawrence and Galveston Railroad Co.'s line, and the completion of the railroad bridge over and across the Neosho River, in accordance with the conditions of this agreement, by the said parties of the second part, and the party of the first part hereby agrees to pay to said parties of the second part the further sum of one hundred thousand dollars in bonds (at par) of Bourbon County, Kansas, and seventy-five thousand dollars in bonds (at par) of Humbol't Township, Kansas, when the said road-bed shall be completed, and the necessary and proper bridges, culverts, water-courses, ditches, & cattle-guards shall be fully built, according to the terms of this contract, by the parties of the second part, from the said point in the city of Fort Scott unto the bluffs in the eastern portion of Allen County, on the west side of the Marmaton River, and to pay to said parties of the second part when the balance of said road-bed, to wit, from the line of said L., L. & Galveston Railroad, in Humbol't Township, Allen Co., K's, to the before-named point on the bluffs in the eastern portion of Allen Co., K's, fully completed and united according to contract, with all necessary bridges, culverts, water-courses, ditches, & cattle-guards, the further sum of twenty-five thousand dollars in bonds (at par) of Bourbon County, Kan., and at the expiration of six months thereafter the further sum of fifty thousand dollars in township bonds (at par) of townships of Allen Co., K's, or Humbol't City bonds, or both, or, in lieu thereof, bonds of like value and amounts, or the then market value of a like amount of such bonds in cash.

37 "It is further stipulated & agreed by and between the parties hereto that before the work on said road-bed shall be commenced in the townships of Saline and Ellsmore, Allen County, K's, the said party of the first part shall give to said parties of the second part good and satisfactory security in the sum of fifty thousand dollars for the prompt payment of said sum of fifty thousand dollars in bonds (at par) of township of Allen Co., K's, before referred to, or, in lieu thereof, their market value in cash.

"It is further agreed that if the said parties of the second part desire to receive and take one hundred thousand dollars in bonds (at par) of the township of Humbol't and city of Humbol't at the time that the thirty thousand dollars in bonds as hereinbefore agreed to be delivered shall become due and payable, then and in that case the parties of the first part agree that the said one hundred thousand dollars in such city & township bonds shall be delivered to the parties of the second part upon the giving, by the said parties last named, good and sufficient security, to the satisfaction of the parties of the first part, for the faithful performance of this said contract.

"It is further agreed and stipulated that on said road-bed there shall be no unnecessary curves or grades, and as to the number and extent of its grades it shall be a good average road-bed as compared with other Kansas railroad-beds.

"It is further stipulated and agreed by and between the parties hereto that all of the said work shall be fully done and completed by the said party of the second part on or before the said 30th day of June, 1872, and if by reason of failure to complete said work or any part thereof any portion of the franchises of said party of the first part shall be lost or forfeited by the party of the first part, said loss or forfeiture shall be borne and inure to said party of the second part, and any such loss shall operate as a payment to the extent of such loss by the

38 party of the first part to the party of the second part of the consideration hereinbefore mentioned and contained. It being hereby

expressly agreed and understood by and between the parties hereto that time is of the essence of this contract and agreement.

"In witness whereof the respective parties hereto have executed this contract in duplicate the day and year first above written, the party of the first part by the hands of its president and secretary, attested by its corporate seal, under and by virtue of a resolution of the board of directors of said corporation passed June 6, 1871, and the parties of the second part by the hand of F. C. Smith & Co., by F. C. Smith.

(Signed) "JOHN S. REDFIELD,
"*Pres. Fort Scott & Allen Co. R. R. Co.*
[SEAL.] "SAMUEL A. MANLOVE,
"*Secretary of the Fort Scott and Allen Co. R. R. Co.*
"F. C. SMITH & CO.,
"By F. C. SMITH."

[5 cents stamp.]

And the complainant further shows unto the court that soon after the execution and delivery of the aforesaid contract, to wit, on or about the 30th day of June, A. D. 1871, the said John Dunn, who is now a resident of the State of New York, assigned all his right and interest to and in the rights, benefits, and obligations of said contract to this complainant, and thereupon this complainant, with the consent of said Fort Scott & Allen County Railroad Company, assumed the sole control and management of the business of constructing said road-bed under said contract, and by agreement with said company was held and treated as the sole contractor, and so continued to own and hold the entire interest therein until the same was fully completed by him, as hereinafter stated.

And the complainant further sheweth unto the court that he faithfully performed the terms and conditions of said contract on his part, and did grade and complete said road-bed, provided for in said contract, of said railroad, from the city of Fort Scott, Bourbon County, Kansas, at the point designated by said railroad company, on the north side of the Marmaton River, and running west to and through the city of Humbol't, Allen County, Kansas, beyond the west line of Bourbon County aforesaid, and to the line of the Missouri & Texas Railway, to the point designated in said contract, and did fully perform and complete all the work specified in said contract to be done by said parties of the second part within the time limited for the performance thereof, and that the same was fully completed on the first day of June, 1872, and that said railroad company, by their said president and directors, signified their approval of the said work and accepted the same, and passed, on the 6th day of June, A. D. 1872, a resolution declaring that this complainant had fully and entirely discharged his obligations undertaken in said contract.

And the complainant further shows unto the court that all the work mentioned in said contract to be by him performed and executed, viz, the grading of said road-bed, constructing all necessary culverts, water courses, ditches, and cattle guards on the line of said road were each and all performed in a good and workmanlike manner, and under the immediate supervision and directions of an engineer appointed and employed by said railroad company for that purpose.

And this complainant further shows unto the court that in part payment of the work and labor by him so performed and materials furnished under and in pursuance of said contract, he received in municipal bonds of the city of Humbol't, Allen County, State of Kansas, twenty-

five thousand dollars at par value, and in municipal bonds of the township of Humbol't, in said Allen County, Kansas, seventy-five
40 thousand dollars par value, and that there now remains due and owing to the complainant by the terms and conditions of said contract for the work and labor so performed and the materials furnished the sum of one hundred and seventy-five thousand dollars, which by said contract was to be paid and discharged by the delivery to this complainant of the above-mentioned municipal bonds of the county of Bourbon, State of Kansas, in the sum of one hundred and twenty-five thousand dollars, and the above-mentioned municipal bonds of the township of Salem, in Allen County, State of Kansas, in the sum of twenty-five thousand dollars, and twenty-five thousand dollars in municipal bonds of Ellsmore Township, in said Allen County, State of Kansas, or in their stead municipal bonds of Humbol't Township, or Humbol't City bonds, or municipal bonds of like value, or their market value in cash.

And the complainant further shows unto the court that he has made demand upon said railroad company for a compliance with the terms of said written contract, and for the delivery to him of all the aforementioned municipal bonds, and that said railroad company have hitherto utterly failed on their part and have not delivered or paid to this complainant anything whatever except the above-mentioned sum of one hundred thousand dollars of Humbol't Township and Humbol't City bonds, viz, twenty-five thousand dollars of Humbol't City bonds and seventy-five thousand dollars of Humbolt Township bonds.

And the complainant further complains against the Board of County Commissioners of Bourbon County, in said State of Kansas, and said defendants, and says that the said county commissioners, having in view the material growth and financial prosperity of said county of Bourbon and State of Kansas, and being desirous of procuring the location and construction of a railroad running from Fort Scott, the
41 county seat and commercial centre of said county of Bourbon, westerly on the north side of Marmaton River and to the city of Humbol't, in Allen County, State of Kansas, and the said county commissioners then believing that the construction of said railroad would add largely to the growth of the city of Fort Scott, and that it would be the means of securing to the merchants and business men of said city a large trade from persons living along the line of said projected railroad and from the country at the west of and in the vicinity of said city of Humboldt and the county of Allen, and also that said projected railroad would furnish another outlet to the large coal-mining interests of said county of Bourbon, located in the vicinity of Fort Scott, and thus secure a more extended market for said coal interests of said city and county, and thereby cause its rapid growth and consequently large benefits to the residents and property owners thereof; in furtherance of said enterprise, and to carry the wishes of the inhabitants of said county into practical effect, the board of county commissioners of said county of Bourbon, in pursuance of the statute in such case made and provided, on the 23rd day of July, 1869, passed a resolution in words and import as follows, to wit:

"That there be subscribed, in the name and for the benefit of the county of Bourbon, in the State of Kansas, one hundred and fifty thousand dollars to the capital stock of any railroad company now organized or that shall be organized hereafter, that shall construct a railroad commencing at the city of Fort Scott, in the county and State aforesaid, running from thence west, north of the Marmaton River, upon the most practicable route, in the general direction of Humbol't, Allen County,

Kansas, and that the bonds of said county be issued to said company for the payment of said subscription, said bonds to be payable within thirty years from the date thereof, and bearing interest, payable semi-
42 annually, at the rate of seven per cent. per annum; provided that said bonds should not be issued until the question should be submitted to a vote of the qualified electors of the county of Bourbon aforesaid, and should have received a majority of the votes cast upon said proposition in favor thereof, in pursuance of the provisions of the statute passed by the legislature of the State of Kansas in such cases made and provided, and that said question should be submitted to said electors at a special election to be held at the usual places of holding elections in said county, on Tuesday, the 24th day of August, A. D. 1869. At the said election the vote should be cast 'For railroad bonds,' and 'Against railroad bonds,' and if it should appear, upon a canvass of the votes cast at said election by the proper officers according to law, that a majority of the votes cast upon said question were in favor of the said subscription, than the above order should be carried into practical operation by the issuing the bonds to said company whenever the County Commissioners of Bourbon County were satisfied that the bonds therein provided for, with the other resources of said company, should be sufficient and adequate to complete the construction of the road-bed ready for the iron from the city of Fort Scott to the west line of Bourbon County."

And petitioner further shows unto the court that a notice was duly given to the people and legal voters of said county that said election would be held on the 24th day of August aforesaid; that said election was duly called and held on that day, and that on that day a vote was duly had at all the proper voting precincts and places in said county, and that said election was held in accordance with the forms of law in such cases provided, and that the votes were cast in favor of and against said proposition, and upon a correct canvass of said votes by the proper officers whose duty it was to make such canvass, it was found
43 (and such was the fact as to said election) that a majority of all the votes cast at said election as aforesaid were in favor of said proposition and that a majority of the legal voters of said county of Bourbon were in favor of and at said election voted in favor of said subscription, and the taking of stock in a railroad located according to the conditions expressed in the resolutions of the said county commissioners.

And complainant further shows unto the court that after the result of said election had been announced, and in the month of October, A. D. 1870, a railroad company was duly incorporated and organized, under and in pursuance of the general statute laws of the State of Kansas, for the purpose of constructing and operating a railroad over and upon the route designated in said resolution of said county commissioners, to wit, west from the said city of Fort Scott, in and through Bourbon County, Kansas, and on the north side of the Marmaton River, to the city of Humbol't, in Allen County, Kansas, which said incorporation was named and designated as the Fort Scott, and Allen County Railroad; and said railroad company thereupon made application to said County Commissioners of Bourbon County for the aforesaid subscription to be made to their aforsaid company, viz, a subscription of one hundred and fifty thousand dollars to their capital stock, whereupon the said county commissioners, after consideration, on the 13th day of October, 1870, passed the following resolution, to wit:

Whereas, upon a proposition submitted to the electors of Bourbon

County, Kansas, on Tuesday, the 24th day of August, 1869, the board of county commissioners of said county were authorized to subscribe the amount of one hundred and fifty thousand dollars to the capital stock of any railroad running westerly from Fort Scott, Kansas, through the county of Bourbon, on the north side of the Marmaton River, in
44 the general direction of Humbol't, Allen County, Kansas, and to issue the bonds of the said county for the payment of said subscription, said bonds to be payable in thirty years from the date of issue and bearing interest payable semi-annually at seven per cent. per annum. Now, therefore, it is ordered by the Board of County Commissioners of Bourbon County, Kansas, that Joseph S. Emert, of Bourbon County, Kansas, be and is hereby appointed subscription agent for Bourbon County, Kansas, and is hereby authorized and directed to subscribe for and in the name of Bourbon County, Kansas, one hundred and fifty thousand dollars to the capital stock of the Fort Scott and Allen County Railroad Company. Yet upon this express condition, that said company or their assigns shall complete the construction of their roadbed, ready for the iron, from Fort Scott to the western line of Bourbon County, Kansas, by the 1st day of July, 1872.

And said resolution was thus attested, viz:

Witness our hands this 13th day of October, A. D. 1870.

(Signed) D. GARDNER, *Chairman.*
H. S. RATH,
DAVID R. COBB,
*Commissioners.*

And the complainant further shows unto the court that the said Joseph S. Emert, subscription agent appointed as aforesaid, on the day of and by virtue of the authority so conferred upon him by said board of county commissioners, proceeded to and did make the subscription upon the books of said company of one hundred and fifty thousand dollars to the capital stock of the said Fort Scott and Allen County Railroad Company, for and in behalf of said county and in the name of said county.

And the complainant, your orator, further shows unto the court that in pursuance of the laws of Kansas, the township of Humbol't, in Allen County, Kansas, through her authorized agent, subscribed to the
45 capital stock of said railroad company seventy-five thousand dollars, to be paid in the bonds of said township and also the city of Humbol't, in said county of Allen, subscribed twenty-five thousand dollars, to be paid in the municipal bonds of said city, and the township of Salem, in said Allen County, Kansas, also subscribed twenty-five thousand dollars to the capital stock of said railroad company, to be paid in the bonds of said township, and the complainant shows unto the court that the aforesaid subscriptions by the municipal corporations above mentioned constituted the entire capital of said railroad company, save the small sums subscribed by individuals, not to exceed the sum of ten thousand dollars, very little of which was paid.

And the complainant further shows unto the court that in pursuance of the aforesaid subscriptions to the capital stock of said railroad company, the said several municipal corporations became shareholders in said railroad company, and as such entitled to vote in the election of its officers, and, through the directors so chosen, to have a voice in the control and management of said road. And the said county commissioners of said county of Bourbon, State of Kansas, selected and appointed several citizens of said county of Bourbon to be present at and attend the

meetings of the stockholders of said railroad company, and to cast the vote of said county of Bourbon at such meetings, according to the interest therein of said county by reason of said subscription, and that said county commissioners of said county, at the election of officers of said railroad company, by their agent duly appointed for that purpose, presented the names of several citizens of said county whom they desired to represent said county in the board of directors of said railroad company; that said persons so selected were duly elected and qualified as such directors of said railroad company, and after they were so elected and qualified as aforesaid, they met with said board of
46 directors of said railroad company and had a large influence and the controlling interest therein, and assisted and advised in the business management of said railroad company from the time the said subscription was made to the capital stock of said railroad company, as aforesaid, up to the commencement of this suit. And the complainant, your orator, further shows unto the court that subsequent to making said subscription to the stock of said company, as aforesaid, and to the election of Samuel Manlove, Benjamin McDonald, John Stewart, E. M. Hatch, and others, whose names are to your orator unknown, to represent said county of Bourbon in said board of directors, as aforesaid, the said county commissioners, by a resolution of their said board, passed and recorded among the records of their proceedings as the board of county commissioners of said county of Bourbon, State of Kansas, July 28th, 1871, ratified and affirmed all their acts and proceedings respecting the making of said subscription to the capital stock of said railroad company and the appointment of the said directors of said railroad company, and by said resolution repledged the good faith of said County of Bourbon in the making said subscription aforesaid, and declared their intention to conform to the terms of said subscription and the conditions of the vote of the electors of said county, whereby they were authorized to take stock in said railroad company, as aforesaid. The resolution of said board, passed as aforesaid, is in the words and figures following, to wit:

Whereas the board having this day been waited on by parties representing the Fort Scott and Allen County Railroad Company, with a request for action on the part of the board relative to the issuing the bonds voted by the people on the 24th day of August, 1869, and it appearing to the board that considerable progress has been made in the work upon said railroad in this county, it is therefore ordered
47 that the bonds aforesaid be prepared as soon as the same can be lithographed, and that they be laid in the fire-proof safe in the vault attached to the treasurer's office, with the signature of the chairman only affixed to all the bonds and coupons, to wait further action by the board.

And your orator further shows unto the court that he entered into the said within contract for the grading of said railroad bed as aforesaid with the said railroad company at the solicitation of the president & directors of said railroad company (of which board the directors representing the said county of Bourbon had the controlling influence), and at the solicitation of the said county commissioners of said county of Bourbon, who assured this complainant that the people of said county very much desired the building of said railroad, and that the bonds of said county were legally voted and would be delivered to said railroad company so that said company could perform the stipulations of the contract as aforesaid with the complainant; and said county commissioners and said county of Bourbon promised and agreed to deliver said bonds

to your orator, if your orator would complete said work specified in said contract, which he then and there promised to do; and further, that they, the said county commissioners, were acting in entire good faith, and that your complainant relied on the good faith of said county commissioners at the time he entered into said contract for the grading of said road, as they, the said county commissioners, were apprised and very well knew that said railroad company had little or nothing wherewith to pay for the large outlay necessary to grade said railroad bed except the municipal bonds above mentioned. And at the time when the said contract for the grading of said road-bed was made by the complain-
48 ant with the president and directors of said railroad company the persons who were chosen, elected, and qualified directors of said company for the county of Bourbon, by reason of the said subscription to the capital stock of said company as aforesaid, and the county commissioners of said county of Bourbon were present and assisting, advising, and consenting to the making of said contract, and thereby affirming and ratifying all the previous actings and doings of said county commissioners respecting the making of said subscriptions and repledging the faith of said county of Bourbon to the issuing and delivery of the bonds of said county in payment of said subscription and in payment to your complainant for the grading of said railroad-bed.

Your orator further shows and alleges that he entered into said contract above mentioned with said railroad company relying upon the representations and assurances frequently and repeatedly made to him by said commissioners of said county of Bourbon that the subscription of said county to the capital stock of said company had been legally made, and that the bonds of said county would be issued therefor and transferred to him whenever said road-bed should be completed in accordance with the provisions of said contract, and that if he had ever received the slightest intimation that this would not be done he would never have entered into said contract or performed said work.

And your orator further shows unto the court in this behalf that after the making of said contract and at divers times during the performance thereof between the 6th day of June, A. D. 1871, and the 6th day of June, A. D. 1872, the said board, president, and directors of the Fort Scott and Allen County Railroad Company aforesaid had numerous meetings for the purpose of transacting business incident to the
49 constructing of said road-bed and carrying into effect the object of said company and the completion of said railroad, at all of which meetings the said directors representing said Bourbon County were present and so took part in all the transactions of said board of directors as the representatives and agents of said county, and voted upon the stock subscribed by said county of Bourbon to said railroad company.

And your orator further shows unto the court that the sole and only inducement to him to take the said contract and make the large outlay of money to execute and perform the same was the pledged faith of said county of Bourbon, in connection with that of the other municipal corporations above mentioned, and their promise to pay up their aforesaid subscriptions to the capital stock of said railroad company and to issue and deliver their aforesaid bonds to said railroad company, as they in good faith and by the terms and conditions of their subscriptions ought to do.

Your orator further shows unto the court that it was well known to all the inhabitants, citizens, and legal voters of said county of Bourbon, while your orator was engaged in the performance of said contract and

long before the completion thereof, that said work was being done and money expended by your petitioner upon the faith that said county had duly subscribed ($150,000) one hundred and fifty thousand dollars to the capital stock of said company, and upon the assurance that it would issue its bonds therefor upon the completion of said contract; and your orator avers that said county commissioners procured said work to be done and said expenditures to be made by your orator by representing
to your orator that said election had been legally held and said
50 capital stock of said railroad company legally subscribed for by
said county, and that the bonds of said county would be issued in payment of said stock and duly given to your orator when said contract should be completed by your orator, and no objection or opposition was ever made thereto by any of the inhabitants, property-owners, or legal voters of said county.

And your orator further shows unto the court in this behalf that he trusted and relied in the pledged faith of said county of Bourbon as aforesaid, and the assurance of said county commissioners and the directors representing said county of Bourbon as her agents as aforesaid, and proceeded to the performance of his stipulations in said contract and did entirely complete the same by the first day of June, 1872, and that said road-bed was on the 1st day of June, A. D. 1872 ready for the iron, and that the county commissioners of said county of Bourbon are entirely without excuse for the non-performance of their stipulations respecting the delivery of the bonds of said county as aforesaid to the said railroad company or to the complainant, yet notwithstanding the said commissioners have hitherto wholly neglected and refused so to do. And the complainant shows that after he had performed and fully completed the grading of said road to the west line of said county and also to the city of Humbol't, in the county of Allen, in said State of Kansas, the said board of county commissioners, notwithstanding the vote of the legal electors of said county on the 24th day of August, A. D. 1869, authorizing said county commissioners to issue said bonds to said railroad company when the resources of said company, in connection with the bonds of said county, were sufficient to complete the grading of said railroad-bed ready for the iron to the west line of said county of Bourbon, and
notwithstanding the subscription made as aforesaid by the said
51 Joseph S. Emert, agent as aforesaid of said county, for and in
behalf of said county, and notwithstanding that the said railroad bed was entirely completed, not only to the west line of said county of Bourbon, but to the city of Humbol't, a distance of over twenty-five miles over and above the requirements of the vote of the electors of said county as aforesaid and the subscription made as aforesaid, yet said county commissioners of said county of Bourbon, in bad faith towards the said railroad company, attempted to impose additional and burdensome conditions upon the issue of the bonds of said county not contained in the proposition voted on by the electors of said county at the election aforesaid held August 24th, 1869, and not contained in the resolution of said board of county commissioners passed as aforesaid on the 13th day of October, A. D. 1870, nor in the resolution of said board authorizing the subscription to the capital stock of the said railroad company.

And the complainant further shows unto the court that the municipal bonds of the said townships of Salem and Ellsmore, in said county of Allen, could not be lawfully issued and delivered by the officers of said townships, nor by the commissioners of said county of Allen, until said railroad was completed, ironed, equip'ed, and in running order.

And the complainant further shows in this behalf that the bonds of

the township of Ellsmore, in said county of Allen, mentioned in said contract for the grading of said road at the time said contract was made had not been authorized by a vote of the electors of said township, and because thereof and because the bonds of said township of Ellsmore, when they should be authorized by the electors, and the bonds of the said township of Salem could not be delivered to the said railroad company until said railroad should be entirely finished, equip'ed, and in running order, and therefore the said railroad company could
52 not deliver the bonds of said townships to the complainant, as by their said contract they had agreed to do. It was therefore provided and stipulated in said contract that the bonds of said township of Salem, in said county of Allen, and the contemplated bonds of the township of Ellsmore, in said county of Allen, should be delivered to the said F. C Smith & Co. within six months next after the completion of the work mentioned in said contract.

And it was further provided and stipulated in that behalf in said contract that before any work was done or commenced on the grading of said road-bed through the said township' of Salem and Ellsmore, the said president and directors " should give to the said F. C. Smith & Co. good and satisfactory security therefor, in the sum of fifty thousand dollars for the prompt payment of said sum of fifty thousand dollars in bonds (at par) of townships of Allen County, Kansas, before referred to, or in lieu thereof their market value in cash."

And the complainant avers that when he was ready and about to commence work on the grading of said road in said township, he notified the said railroad company thereof and demanded the security above mentioned, and that the president and directors of said company procrastinated and delayed the giving of the same from time to time upon various pretexts, and finally utterly failed and neglected and refused to furnish the same to the complainant, or to the said F. C. Smith & Co. any security whatever.

And the complainant further shows unto the court that more than three years have elapsed since the completion of the work aforesaid under said contract, and the payment therefor has been due and undischarged and unpaid, yet the said railroad company, the presi-
53 dent and directors, have taken no steps, nor have they instituted any legal proceedings whatever to enforce the payment to them of the aforesaid subscription to the capital stock of said railroad company by said county of Bourbon, nor to compel the issuing and delivery of the aforesaid bonds of said county of Bourbon in discharge of said subscription. And the complainant further shows unto the court that said railroad company is utterly insolvent, and has no means or property except the right of way and the road-bed constructed and built thereon by the complainant and the aforesaid claims against the aforesaid municipal corporations for their several subscriptions to the capital stock of said railroad company. And your orator charges that he is entitled to receive from said county of Bourbon, and from the county commissioners of said county the bonds of said county in the sum of one hundred and twenty-five thousand dollars, according to the stipulation in said contract with said railway company, and in pursuance of the vote of the legal voters of said county and the action of said commissioners, and in the further and additional sum of twenty-five thousand dollars also due to your orator under said contract, which said company has failed to pay your orator, and which additional sum of twenty-five thousand dollars was authorized by the vote of the legal

long before the completion thereof, that said work was being done and money expended by your petitioner upon the faith that said county had duly subscribed ($150,000) one hundred and fifty thousand dollars to the capital stock of said company, and upon the assurance that it would issue its bonds therefor upon the completion of said contract; and your orator avers that said county commissioners procured said work to be done and said expenditures to be made by your orator by representing
to your orator that said election had been legally held and said
50 capital stock of said railroad company legally subscribed for by
said county, and that the bonds of said county would be issued in payment of said stock and duly given to your orator when said contract should be completed by your orator, and no objection or opposition was ever made thereto by any of the inhabitants, property-owners, or legal voters of said county.

And your orator further shows unto the court in this behalf that he trusted and relied in the pledged faith of said county of Bourbon as aforesaid, and the assurance of said county commissioners and the directors representing said county of Bourbon as her agents as aforesaid, and proceeded to the performance of his stipulations in said contract and did entirely complete the same by the first day of June, 1872, and that said road-bed was on the 1st day of June, A. D. 1872 ready for the iron, and that the county commissioners of said county of Bourbon are entirely without excuse for the non-performance of their stipulations respecting the delivery of the bonds of said county as aforesaid to the said railroad company or to the complainant, yet notwithstanding the said commissioners have hitherto wholly neglected and refused so to do. And the complainant shows that after he had performed and fully completed the grading of said road to the west line of said county and also to the city of Humbol't, in the county of Allen, in said State of Kansas, the said board of county commissioners, notwithstanding the vote of the legal electors of said county on the 24th day of August, A. D. 1869, authorizing said county commissioners to issue said bonds to said railroad company when the resources of said company, in connection with the bonds of said county, were sufficient to complete the grading of said railroad-bed ready for the iron to the west line of said county of Bourbon, and
notwithstanding the subscription made as aforesaid by the said
51 Joseph S. Emert, agent as aforesaid of said county, for and in
behalf of said county, and notwithstanding that the said railroad bed was entirely completed, not only to the west line of said county of Bourbon, but to the city of Humbol't, a distance of over twenty-five miles over and above the requirements of the vote of the electors of said county as aforesaid and the subscription made as aforesaid, yet said county commissioners of said county of Bourbon, in bad faith towards the said railroad company, attempted to impose additional and burdensome conditions upon the issue of the bonds of said county not contained in the proposition voted on by the electors of said county at the election aforesaid held August 24th, 1869, and not contained in the resolution of said board of county commissioners passed as aforesaid on the 13th day of October, A. D. 1870, nor in the resolution of said board authorizing the subscription to the capital stock of the said railroad company.

And the complainant further shows unto the court that the municipal bonds of the said townships of Salem and Ellsmore, in said county of Allen, could not be lawfully issued and delivered by the officers of said townships, nor by the commissioners of said county of Allen, until said railroad was completed, ironed, equip'ed, and in running order.

And the complainant further shows in this behalf that the bonds of

the township of Ellsmore, in said county of Allen, mentioned in said contract for the grading of said road at the time said contract was made had not been authorized by a vote of the electors of said township, and because thereof and because the bonds of said township of Ellsmore, when they should be authorized by the electors, and the bonds of the said township of Salem could not be delivered to the said railroad company until said railroad should be entirely finished, equip'ed, and in running order, and therefore the said railroad company could
52 not deliver the bonds of said townships to the complainant, as by their said contract they had agreed to do. It was therefore provided and stipulated in said contract that the bonds of said township of Salem, in said county of Allen, and the contemplated bonds of the township of Ellsmore, in said county of Allen, should be delivered to the said F. C Smith & Co. within six months next after the completion of the work mentioned in said contract.

And it was further provided and stipulated in that behalf in said contract that before any work was done or commenced on the grading of said road-bed through the said township' of Salem and Ellsmore, the said president and directors " should give to the said F. C. Smith & Co. good and satisfactory security therefor, in the sum of fifty thousand dollars for the prompt payment of said sum of fifty thousand dollars in bonds (at par) of townships of Allen County, Kansas, before referred to, or in lieu thereof their market value in cash."

And the complainant avers that when he was ready and about to commence work on the grading of said road in said township, he notified the said railroad company thereof and demanded the security above mentioned, and that the president and directors of said company procrastinated and delayed the giving of the same from time to time upon various pretexts, and finally utterly failed and neglected and refused to furnish the same to the complainant, or to the said F. C. Smith & Co. any security whatever.

And the complainant further shows unto the court that more than three years have elapsed since the completion of the work aforesaid under said contract, and the payment therefor has been due and undischarged and unpaid, yet the said railroad company, the presi-
53 dent and directors, have taken no steps, nor have they instituted any legal proceedings whatever to enforce the payment to them of the aforesaid subscription to the capital stock of said railroad company by said county of Bourbon, nor to compel the issuing and delivery of the aforesaid bonds of said county of Bourbon in discharge of said subscription. And the complainant further shows unto the court that said railroad company is utterly insolvent, and has no means or property except the right of way and the road-bed constructed and built thereon by the complainant and the aforesaid claims against the aforesaid municipal corporations for their several subscriptions to the capital stock of said railroad company. And your orator charges that he is entitled to receive from said county of Bourbon, and from the county commissioners of said county the bonds of said county in the sum of one hundred and twenty-five thousand dollars, according to the stipulation in said contract with said railway company, and in pursuance of the vote of the legal voters of said county and the action of said commissioners, and in the further and additional sum of twenty-five thousand dollars also due to your orator under said contract, which said company has failed to pay your orator, and which additional sum of twenty-five thousand dollars was authorized by the vote of the legal

voters of said county as well as by the action and vote of said county commissioners after said election was held.

Your orator avers that a judgment alone against said railroad company would afford him no relief whatever in the premises. Forasmuch, therefore, as your orator is remediless in a court of law in the premises, & can only have relief in a court of equity, where matters of this nature are properly cognizable, your orator prays that an order or decree of this court may be made against said railroad company, and the
54 president and directors thereof, ordering them to assign to your petitioner their claim against the aforesaid county of Bourbon, and that said Bourbon County be directed and decreed to cause said county bonds to be issued and delivered to your orator, or to pay to your orator said indebtedness of one hundred and twenty-five thousand dollars, and that the said commissioners of said county of Bourbon may be ordered and decreed by this honorable court to sign and issue the bonds of said county of Bourbon in the sum of one hundred and twenty-five thousand dollars, payable in thirty years from the date thereof, with semi-annual interest coupons attached, payable in New York, in accordance with the terms of the aforesaid subscription to the capital stock of said railroad company, payable to your orator, said complainant, and that they deliver said bonds to your orator in satisfaction and payment of a corresponding amount of the indebtedness due to him by said railroad company under said contract; and that your orator may have such other and further relief in the premises, or other and different relief, as to the court shall seem just. May it please the court to grant process against the said The Fort Scott, Humbol't & Western Railroad Company, and against the said county of Bourbon, and the said The County Commissioners of Bourbon County, defendants herein, commanding them to appear and answer the premises (but not under oath, the oath of said defendants being hereby expressly waived) by the next term of this honorable court. And your orator will ever pray, &c.

FRANKLIN C. SMITH.
MILLER & FROST, *Solicitors.*

MILLER & FROST, *of Counsel.*
J. H. GILLPATRICK, *of Counsel.*

(Endorsed:) No. 1361. United States circuit court, dist. of Kansas.
F. C. Smith vs. The Fort Scott, Humboldt & Western R. R. Co.
55 et al. Amended bill. Filed Dec. 24, 1875. A. S. Thomas, clerk.

And on this day, to wit, the 7th day of January, A. D. 1876, the parties plaintiff, by his solicitors, filed in the clerk's office of said court his stipulation in the above-entitled suit, which said stipulation, with the endorsements thereon, are in the words and figures following, to wit:

*Stipulation.*

In the circuit court of the United States, district of Kansas.

FRANKLIN C. SMITH, COMPLAINANT,
*vs.*
THE FORT SCOTT, HUMBOL'T AND WESTERN Railroad Company, and the County of Bourbon, State of Kansas, and the County Commissioners of Bourbon County, State of Kansas, defendants.

It is agreed that the defendants may refile their demurrers heretofore filed as demurrers to the amended bill of complaint of said complainant.

MILLER & FROST.
*Sol'rs for Complainant.*

(Endorsed:) No. 1361. F. C. Smith vs. Bourbon Co. et al. Stipulation. Filed Jan'y 7, 1876. A. S. Thomas, clerk.

And on the same day, to wit, the 7th day of January, 1876, the said defendants, by their solicitors, refiled in the clerk's office of said court their demurrers in the above-entitled suit, which said demurrers, with the endorsements thereon, are in the words and figures following, to wit:

*Demurrer.*

In the circuit court of the United States for the district of Kansas.

FRANKLIN C. SMITH
*vs.*
THE FORT SCOTT, HUMBOLDT & WESTERN Railroad Company, the County of Bour-
56 bon, and the County Commissioners of Bourbon County.

The joint and several demurrer of the Fort Scott, Humboldt & Western Railroad Company, the County of Bourbon, and the County Commissioners of Bourbon County to the bill of complaint of Franklin C. Smith, complainant.

These defendants, respectively, by protestation, not confessing or acknowledging all of the matters and things in the said bill of complaint to be true in manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show that the said complainant hath not by his said bill made such a case as entitles him in a court of equity to any relief from or against these defendants, or either of them, and that the said bill is wholly insufficient in law; wherefore these defendants do severally demur to the said bill, and to all the matters and things therein contained, and humbly pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, and pray hence to be dismissed, with their reasonable costs in this behalf sustained.

McCOMAS & McKEIGHAN,
*Sol. for said Defendants.*

I, H. C. McComas, certify that in my opinion the foregoing demurrer of these defendants to the bill of complaint of the complainant is well founded in law and proper to be filed in the said cause.

H. C. McCOMAS,
*Sol. and of Counsel for the said Defendant.*

UNITED STATES OF AMERICA,
*District of Kansas, ss:*

John S. Redfield, president of the said F't Scott, Humboldt & Western Railway Company, and B. R. Wood, chairman of the Board of
57 County Commissioners of Bourbon County, being severally duly sworn, each for himself doth say that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not

interposed for the purposes of delaying the said suit or any proceeding therein.

B. R. WOOD,
*Ch'm Board of Commissioners.*
JOHN S. REDFIELD,
*Pres. of F. S., H. & W. R. R. Co.*

Sworn to and subscribed before me this 1st day of September, A. D. 1875.

[SEAL.] JAMES H. SALLE,
*Notary Public.*

(Endorsed:) No. 1361. F. C. Smith vs. The Fort Scott, Humboldt, and Western R. W. Co. et al. Demurrer. Filed Sept. 2, 1875. A. S. Thomas, clerk. Filed Jan'y 7, 1876. A. S. Thomas, clerk.

*Demurrer.*

In the circuit court of the United States, district of K's.

FRANKLIN C. SMITH, COMPLAINANT,
*vs.*
THE FORT SCOTT, HUMBOL'T, AND WESTERN Railroad Company, and the County of Bourbon, State of Kansas, and the County Commissioners of Bourbon County, State of Kansas, defendants.

The joint and several demurrers of the Fort Scott, Humbol't, & Western Railroad Company, the County of Bourbon, and the County Commissioners of Bourbon County, State of Kansas, to the bill of complaint of Franklin C. Smith.

These defendants, respectively, by protestation, not confessing or acknowledging all of the matters and things in the said bill of complaint to be true in manner and form as the same are therein set forth and alleged, for new and additional grounds of demurrer to those set forth
58 in the demurrer on file, show to the court that this court ought not to proceed farther in the hearing of said bill of complaint, because it appears from said bill that this court has no jurisdiction of the parties to this suit, nor either of them.

2d. And for further ground of demurrer to said bill of complaint, said defendants respectively show to the court that it appears from said bill of complaint that the same is exhibited against said defendants jointly for several distinct matters and causes, in many whereof, as appears by the said bill, these defendants are not jointly interested, by reason of which distinct matters the said bill is drawn out to a considerable length, and these defendants are each compelled to take a copy of the whole thereof, and by joining distinct matters together, which do not depend on each other in the said bill, the pleadings, orders and proceedings will in the progress of the said suit be intricate and prolix and these defendants be severally and jointly put to unnecessary charges in taking copies of the same, although several parts in no way relate to or concern them jointly.

McCOMAS & McKEIGHAN,
*Solicitors and of Counsel for Defendant.*

I certify that in my opinion the foregoing demurrer to the foregoing

bill of complaint is well founded in law and proper to be filed in the foregoing cause.

J. E. McKEIGHAN,
*Solicitor and of Counsel for Defendants.*

J. E. McKeighan, being duly sworn, deposes and says that he has read the foregoing demurrer, and that the same is not interposed for delay; that he is one of the solicitors of defendants, and none of said defendants are in attendance, nor no officer thereof, to make this affidavit.

J. E. McKEIGHAN.

Subscribed and sworn to before me this 30th day of November, 1875.

A. S. THOMAS, *Clerk.*

59 (Endorsed:) No. 1361. Franklin C. Smith vs. S. W. & H. R. R. Co. & County of Bourbon, &c. Demurrer. Filed Nov. 30, 1875. A. S. Thomas, clerk. Filed Jan'y 7, 1876. A. S. Thomas, clerk.

And on this day, to wit, the 6th day of June, 1876, in the June term of said court, in the record of the proceedings in the above-entitled suit, is the following entry, in the words and figures following, to wit:

*Decree.*

THURSDAY, *June* 6, 1876.

| | | |
|---|---|---|
| FRANKLIN C. SMITH, COMPLAINANT, *vs.* THE FORT SCOTT, HUMBOLDT AND WESTERN Railway Company, and the County of Bourbon, State of Kansas, and the County Commissioners of Bourbon County, State of Kansas, defendants. | 1361. | In equity. |

This cause came on to be heard at this term on the demurrer of the defendants to the amended bill of the complainant and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz: that the said demurrer be & the same is hereby sustained, and that the said amended bill be and the same is hereby dismissed, with costs; and thereupon the complainant, in open court, prayed an appeal to the Supreme Court of the United States, which is granted on the complainant's giving a bond to the defendants, to be approved by one of the judges of this court, in the sum of five hundred dollars.

JOHN F. DILLON, *Judge.*

And on this day, to wit, the 14th day of June, 1876, came the said complainant, by his attorneys, and filed in the clerk's office of said court his appeal bond in the above-entitled suit, which said appeal bond is in the words and figures following, to wit:

*Copy of bond.*

Supreme Court of the United States.

FRANKLIN C. SMITH, COMPLAINANT,
60 *vs.*
THE FORT SCOTT, HUMBOLDT AND WESTERN Railroad Company, and the County of Bourbon, State of Kansas, and the County Commissioners of Bourbon County, State of Kansas, defendants.

Know all men by these presents that we, Franklin C. Smith, as principal, and John C. Stewart, all of , are held and firmly bound unto the Fort Scott, Humboldt, and Western Railroad Company, and the County of Bourbon, State of Kansas, and the County Commissioners of Bourbon County, State of Kansas, in the sum of five hundred (500) dollars, to be paid to the said The Fort Scott, Humboldt and Western Railroad Company, the County of Bourbon, State of Kansas, and the County Commissioners of Bourbon County, State of Kansas, their successors or assigns, to which payment, well and truly to be made, we bind bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors and administrators, firmly by these presents, sealed with our seals. Dated this ninth day of June, A. D. 1876.

Whereas the above-named Franklin C. Smith hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the district of Kansas:

Now, therefore, the condition of this obligation is such that if the above-named Franklin C. Smith shall prosecute his said appeal to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

61 F. C. SMITH. [SEAL.]
JOHN C. STEWART. [SEAL.]
JOHN McFARLAND. [SEAL.]

Sealed and delivered in presence of—

UNITED STATES,
*Northern District of Illinois, ss:*

I, G. C. Lanphere, a commissioner duly appointed by the circuit court of the United States in and for said northern district to administer oaths, take acknowledgments of bail, &c., do hereby certify that, on this 10th day of June, A. D. 1876, John C. Stewart, who signed the above bond as security, came before me, and having been by me duly sworn according to law to testify the truth in the matter, stated that he was worth ten thousand dollars and upwards over and above all his debts and liabilities of any kind whatever; and at the same time came John McFarland, who also signed the said bond as security, and who, having been by me duly sworn according to law to testify the truth in the matter, stated that he was worth ten thousand dollars and upwards over and above all his debts and liabilities. And I further certify that I am well acquainted with the said Stewart and McFarland, and know them to be credible persons, and believe them to be amply good for the sum they name.

Witness my hand and official seal this 10th day of June, A. D. 1876.
[SEAL.] G. C. LANPHERE,
*U. S. Com'r.*

Bond approved June 14, 1876.

JOHN F. DILLON, *Judge.*

(Endorsed:) Filed June 14, 1876. A. S. Thomas, clerk.

62, 63 UNITED STATES OF AMERICA,
*District of Kansas, ss:*

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy from the record of all the proceedings in the suit of Franklin C. Smith vs. The Fort Scott, Humboldt and Western Railroad Company et al., No. 1361, in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 3rd day of August, A. D. 1876.

A. S. THOMAS, *Clerk.*

64 UNITED STATES OF AMERICA:

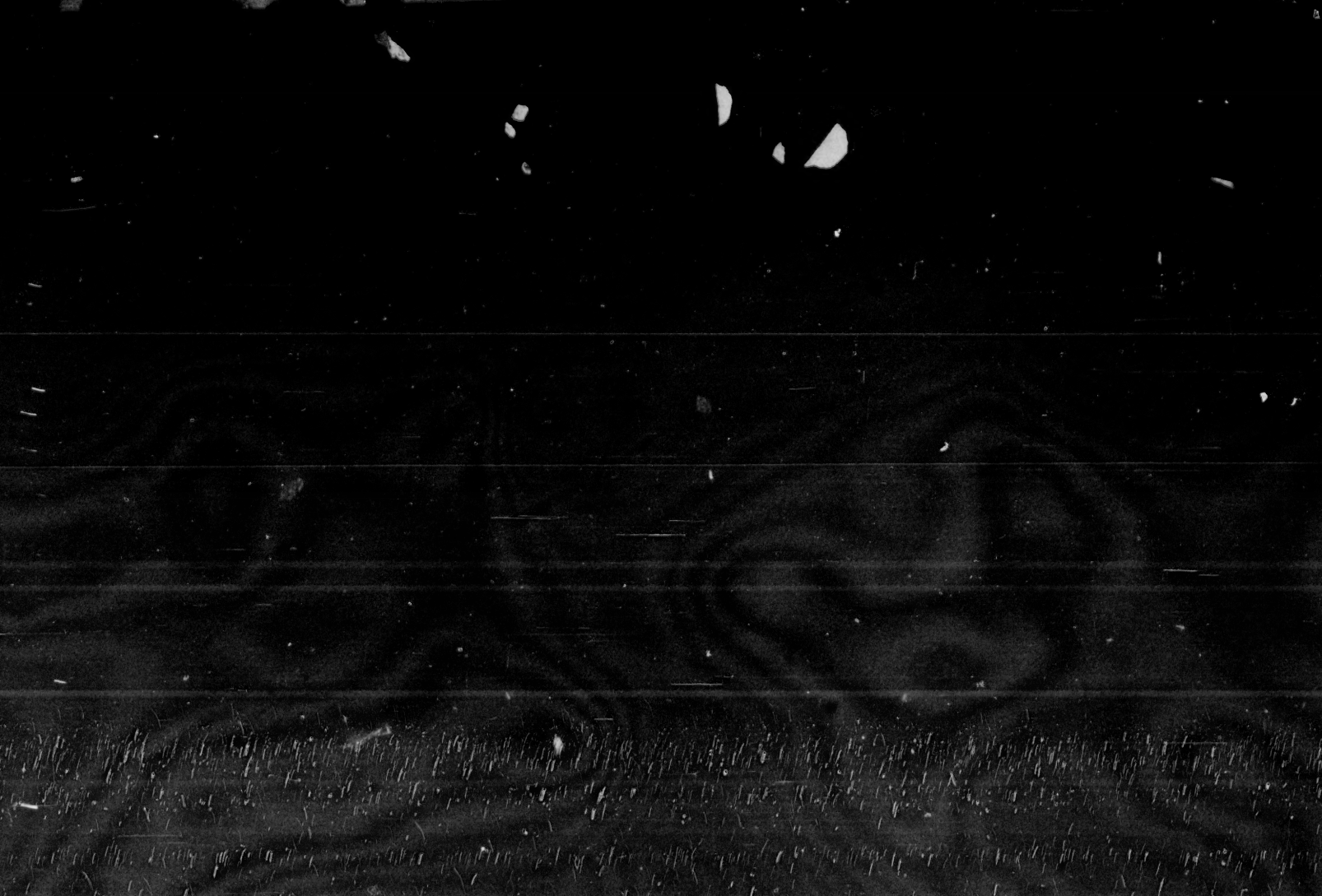
In the Supreme Court of the United States, October term, 1876.

FRANKLIN C. SMITH, APPELLANT,
*vs.*
THE FORT SCOTT, HUMBOLDT AND WESTERN Railroad Company, and the County of Bourbon, State of Kansas, and the County Commissioners of Bourbon County, State of Kansas, appellees.

And now comes the said appellant, by Thomas G. Frost, his solicitor, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, the decree of the court below is contrary to equity. By reason whereof the appellant prays that said decree may be reversed.

T. G. FROST,
*Attorney for Appellant.*

(Indorsement on cover:) No. 223. Franklin C. Smith, appellant, vs. The Fort Scott, Humboldt & Western Railroad Company, and the County of Bourbon & al. Kansas C. C. U. S. Filed 11th October, 1876.



IN THE

# SUPREME COURT OF THE UNITED STATES,

*OCTOBER TERM, A. D. 1878.*

No. 223.

FRANKLIN C. SMITH, *Appellant,*

*vs.*

THE FORT SCOTT, HUMBOLDT AND WESTERN RAILROAD COMPANY, and the COUNTY OF BOURBON, *et al.*, *Appellees.*

Appeal from the Circuit Court of the United States for the District of Kansas.

## Brief and Argument in Behalf of Appellant.

MILLER & FROST, ATT'YS FOR APPELLANT.

CHICAGO:
PRESS OF BEACH, BARNARD & CO., LEGAL PRINTERS, NO. 104 RANDOLPH STREET.
1879.

IN THE

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*OCTOBER TERM, A. D. 1878.*

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Appeal from the Circuit Court of the United States for the District of Kansas.

## STATEMENT OF CASE.

Franklin C. Smith, of Illinois, filed his bill of complaint in the Circuit Court of the United States of the District of Kansas, on the 7th of August, 1875, against the Fort Scott, Humboldt and Western Railroad Company, a corporation organized and existing under the laws of the State of Kansas, and the County Commissioners of Bourbon County, in said State.

The bill alleges that complainant and one John Dunn, under the firm name of F. C. Smith & Co., in the month of June, 1871, made a contract with the late Fort Scott and Allen County Railroad Company, now the Fort Scott, Humboldt and Western Railroad Company, whose

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The bill alleges that complainant and one John Dunn, under the firm name of F. C. Smith & Co., in the month of June, 1871, made a contract with the late Fort Scott and Allen County Railroad Company, now the Fort Scott, Humboldt and Western Railroad Company, whose

said road is located as follows, to wit: Commencing at Fort Scott, Bourbon County, Kansas; running thence west, north of the Marmaton River, upon the most practicable route in the general direction of Humboldt, Allen County, in the State of Kansas, to and beyond the western line of Bourbon County, by which contract F. C. Smith & Co. agreed to locate, survey, grade and bridge a railroad bed extending from Fort Scott westerly along and on the north side of Marmaton River through Bourbon County to the city of Humboldt in Allen County in the State of Kansas, and in all respects complete the grading of said road-bed, and construct all necessary bridges and culverts therefor, and put the same in condition to receive the superstructure by the first day of July, A. D. 1872.

That the railroad company agreed to pay and deliver to F. C. Smith & Co. therefor certain municipal bonds, amounting in the aggregate to $275,000 par value, to wit, $125,000 in bonds of the County of Bourbon, $25,000 in bonds of the City of Humboldt in Allen County, $75,000 in the bonds of Humboldt Township, $25,000 in bonds of Salem Township, and $25,000 in bonds of the Township of Ellsmore; and it was further provided in said contract, that if the Company failed to obtain the bonds of the Township of Ellsmore, then in their stead it would pay a like amount of the bonds of Humboldt Township or Humboldt City, or bonds of the like character and value, or the cash value in money. The contract is then set forth — pages 2, 3 and 4 of the record — that immediately after the execution of the contract, John Dunn assigned his interest in the contract to complainant, who thereupon undertook its performance, and complainant held the entire interest therein until the same was completed by him, as thereinafter stated. That complainant performed the terms and conditions of said contract on his

part, and graded and completed said road-bed, provided for in said contract, of said railroad from the city of Fort Scott, at the point designated by said railroad company on the north side of the Marmaton River, and running west to and through the city of Humboldt beyond the west line of Bourbon County to the line of the Missouri and Texas Railway, to the point designated in said contract, and completed the same within the time limited for the performance thereof by the first day of June, A. D. 1872; and that said railroad company signified their approval of said work, and accepted the same, and on the 6th day of June, 1872, passed a resolution declaring that complainant had fully and entirely discharged his obligations undertaken in said contract. That all the work mentioned in the contract to be performed by complainant, to wit, the grading of said road-bed, constructing all culverts, water-courses, ditches and cattle-guards on the line of said road, were performed in a good and workmanlike manner under the immediate and direct supervision of the railroad company.

The bill then proceeds to state the amount paid under the contract, and to establish the liabilities of Bourbon County to issue the bonds of that county, in substance as follows, viz: It avers the receipt of the municipal bonds of the city and township of Humboldt in the sum of one hundred thousand dollars — twenty-five thousand of the city, and seventy-five thousand dollars of the town of Humboldt; and that there is still due and owing the complainant the sum of one hundred and seventy-five thousand dollars, of which there is due one hundred and twenty-five thousand dollars in Bourbon County bonds, and the further sum of twenty-five thousand of bonds of Salem Township, and twenty-five thousand of the bonds of Elsmore Township in said Allen County, or in their stead municipal bonds of Humboldt Township or Hum-

boldt City, or of municipal bonds of like value, or their market value in cash. The bill then, in substance, avers that the commissioners of Bourbon County, with a view to the commercial prosperity of the State of Kansas, and believing that the construction of a railroad from Fort Scott, the county seat of Bourbon County, on the north side of the Marmaton River, and to the City of Humboldt in Allen County, Kansas, would add largely to the growth of the City of Fort Scott, and furnish an outlet to the large coal mining interest of said County of Bourbon, did on the 24th day of July, 1869, pass a resolution (pages 23 and 24 of the printed abstract) calling an election on the 24th day of August, 1869, under the statute of the State of Kansas, submitting to the qualified voters of said county the question whether the county should subscribe $150,000 to the capital stock of any railroad company then organized, or which shall be thereafter organized, that should construct a railroad commencing at the City of Fort Scott, in the County of Bourbon and State of Kansas, running from thence west north of the Marmaton River upon the most practicable route, and providing the bonds of the said county should be issued to secure said subscription when the commissioners of said county were satisfied that the said county bonds and the other resources of the said company should be sufficient and adequate to construct said road-bed ready for the iron from Fort Scott to the west line of said Bourbon County. That afterwards, and on the 24th day of August following, there was an election of the voters of the county, as provided by the statute and the resolution of the county commissioners aforesaid, resulting in favor of said subscription, and that on the 13th day of October, A. D. 1870, a railroad was duly incorporated by the laws of the State of Kansas for the purpose of constructing and operating a railroad over and upon said route so designated, named the Fort Scott

and Allen County Railroad; and said railroad company made application to said commissioners for said subscription of one hundred and fifty thousand dollars; and on the 13th of October, A. D. 1871, said commissioners passed a resolution authorizing one Joseph S. Emert, of Bourbon County, to subscribe to said railroad the sum of one hundred and fifty thousand dollars, on the express condition "that said company or their assigns shall complete the "construction of their road-bed, ready for the iron, from "Fort Scott to the western line of said County of Bour-"bon, and State of Kansas, by the 1st day of July, 1872."

The complaint shows that said Joseph S. Emert, subscription agent aforesaid, did subscribe for and on behalf of said ~~company~~ County said one hundred and fifty thousand dollars in bonds pursuant to said resolution, as well as the said county of Humboldt seventy-five thousand, and the city of Humboldt the sum of twenty-five thousand, the township of Salem also the sum of twenty-five thousand dollars, and by said subscription, said municipal corporations became stockholders in said railroad corporation: and said county commissioners of said county of Bourbon selected citizens of said county to represent the county aforesaid at the meetings of the stockholders of said railroad company, and said acts and proceedings relative to subscribing to said railroad company were duly ratified and confirmed by said county; that said county was duly represented at the meeting of the railroad company aforesaid and voted upon the stock so subscribed to said railroad company; and said county of Bourbon through its board of commissioners when requested by the agents of the Fort Scott and Allen County Railroad Company to issue the bonds, resolved that they be prepared as soon as they could be lithographed, and that they be laid in the fire-proof safe, in the vault attached to the treasurer's office, with the signature of the chairman only affixed to all the bonds

and coupons, to await further action of the board; that the contract aforesaid in the bill set forth between said railroad company and said Smith was entered into by said company, "at the solicitation of the president and directors "of said railroad company (of which board the directors "representing said county of Bourbon had the controlling "influence,) and at the solicitation of the county commis- "sioners of the said county of Bourbon, who assured the "complainant, that the people of the county very much de- "sired the building of said railroad, and that the bonds "of the said county were duly voted, and would be "delivered to the said railroad company, so that the said "company could perform the stipulation of the contract as "aforesaid with the complainant and said county commis- "sioners, and said county of Bourbon promised and agreed "to deliver said Bonds to the complainant, if he completed said work "specified in said contract, which he then and there prom- "ised to do; and further that they, the said county com- "missioners were acting in entire good faith, and that "your complainant relied upon the good faith of said "county commissioners at the time he entered into said "contract for the grading of said road, as they, the "said county commissioners were apprised, and very "well knew that said railroad company had little or noth- "ing wherewith to pay for the large outlay necessary to "grade the said railroad bed, excepting the municipal "bonds above mentioned."

The complaint further avers, that the commissioners of said county of Bourbon were present, assenting to and advising the making of said contract, and agreed to the same, and further agreed that in case said contract was performed by said railroad company, the bonds of said county of Bourbon should be issued and delivered to said railroad company, and said county of Bourbon so agreed, and said complainant by said county of Bourbon was assured

that said subscription of said county to said railroad was in all respects valid and legally made, and the faith of said county of Bourbon was pledged to said complainant, for the issuing and delivery of said bonds, upon the fulfillment of said contract; that relying upon the pledged faith of said county of Bourbon the work provided for in said contract was by complainant fully performed; that between the time said contract was made, and said work done, between the 6th day of June A. D. 1871, and the 6th day of June A. D. 1872, the said president and directors of the Fort Scott and Allen County Railroad Company had numerous meetings for constructing said railroad bed, and carrying into effect the object of said contract, and of said company, at all of which meetings the directors representing said Bourbon County were present, and took part in all the transactions of said board, as the representatives of said county, and voted upon stock subscribed by the said county of Bourbon to said railroad company; and said complainant further states that the essential inducement to do and perform the work stipulated for in the said written contract was the pledged faith of the county of Bourbon to pay up said subscription, and to issue said bonds upon the performance of said work, and all this was well known to the inhabitants of the said county of Bourbon, as it was well known by them "that said work was being done "and money expended by the complainant upon the faith "that the said county had duly subscribed one hundred "and fifty thousand dollars to the capital stock of said "company, and upon the assurance that it would issue its "bonds therefor upon the completion of the said con-"tract."

And complainant avers that the said County Commissioners procured the said work to be done, and expenditures to be made, by the complainant; that said election had been legally held, and said capital stock subscribed

by said company; that the bonds would be issued in payment of said stock, and duly given to the said complainant, when the said contract should be completed by the complainant; and no objection or opposition was made thereto by any of the inhabitants, property owners, or legal voters of said county; and the complainant further avers that he, the complainant, trusted and relied upon the pledged faith of said County of Bourbon, and the assurance of the said County Commissioners and directors representing said County of Bourbon, its agents, as aforesaid, and proceeded to the performance of the said contract, and actually completed the same by the 1st day of June, A. D. 1872; and that said road-bed was by the 1st day of June, A. D. 1872, ready for the iron; and that the said County Commissioners of said county are entirely without excuse for the non-performance of their stipulations for the delivery of said bonds, and that said bonds have never been issued, and that in fact additional and burdensome conditions have been imposed upon the issue of said bonds of Bourbon County, not contained in the proposition voted on by the electors of the county, and not contained in the resolutions of the Board of Commissioners of said county, passed on the 13th day of October, A. D. 1871, nor contained in the resolution of said board, authorizing the subscription to the capital stock of said railroad company. The complainant further states, that there has been no fulfillment of said contract by the delivery of the bonds of said townships of Salem and Elsmore, within six months after the completion of the work mentioned in said contract, or has security therefore, as agreed, been furnished, and that although more than three years have elapsed since the completion of said contract, no steps have been taken by said railroad company, or by said County of Bourbon, to furnish or deliver said bonds, and the complainant charges that said railroad

company is insolvent, and the only remedy left said complainant is the issue and delivery of said bonds.

And the bill concludes with a prayer that said railroad company be required, by decree of the court, to assign to complainant their claim against the County of Bourbon for $125,000, and that the commissioners of the County of Bourbon be decreed to issue said bonds of said county, to pay the indebtedness due complainant of $125,000, said bonds to be payable 30 years from the date thereof, to wit, from the first day of July, 1872, when said work was completed, and said bonds should have been issued, payable according to the terms of said subscription, and deliver them to complainant in satisfaction of said indebtedness; and also prays for process against the Fort Scott, Humboldt and Western Railroad Company (formerly The Fort Scott and Allen County Railway Company), and against the County of Bourbon, and the County Commissioners of Bourbon.

Defendants appeared August 7, 1875, and filed a general demurrer September 2, 1875, and a special demurrer, alleging that the bill is multifarious, November 30, 1875.

On the 24th of December, 1875, demurrer was sustained, and on the 24th of December, 1875, complainant filed amended bill, in which he omitted claim against the township of Salem, and confined it to the subscription by the County of Bourbon, viz, $125,000, and the bonds that were to be issued by said county therefor. Demurrer was filed to the amended bill in behalf of defendants. The case was heard on the amended bill June 6th, 1876. The demurrer was sustained, and the bill dismissed, and complainant has appealed from this decree.

## ARGUMENT.

The legislature of Kansas has clearly conferred upon the counties of the State, including that of Bourbon County, the power to issue bonds, and to subscribe to the capital stock of any railroad company, whether organized under the laws of Kansas, or any other State, proposing to construct a railroad, in or near or through such counties, by act of February 10, 1865 (Ch. 12), and the amendatory act of February 26, 1866 (Ch. 24), with, however, the proviso, "that no such bonds shall be issued until the "question shall first be submitted to the vote of the qualified electors of the county at some general election, or "at some special election to be called by the board of "county commissioners. * * * And in submitting "said question, said board of commissioners shall direct in "what manner the ballots shall be cast; if the majority of "the votes cast at such election shall be in favor of issuing "such bonds, the board of county commissioners shall "issue the same." The act entitled the act to authorize counties to issue bonds to railroad companies, approved February 26, A. D. 1868 (Gen. Stat., 892), cures all irregularities and omissions in the proceedings of the commissioners. Under this power thus conferred, and by the act of the legislature of Kansas, and by virtue of the general powers which the commissioners of the county possessed, the election provided for by said act of the legislature was held, and the necessary vote in favor of a subscription, and the issuing of the bonds to secure the same, was given by the electors of Bourbon County, on the 24th day of August, A. D. 1869, resulting as already stated in favor of the subscription and bonds.

The bill alleges that the board of county commissioners of Bourbon County, in the State of Kansas, in order to

procure the location and construction of a railroad from Fort Scott, the county seat and commercial centre of said county, westerly and on the north side of Marmaton River, to the city of Humboldt, in Allen County, in said State, for the purpose of increasing the financial growth and material prosperity of said county and the inhabitants thereof, on the 13th of October, 1870, resolved that there be subscribed in the name and for the benefit of said county of Bourbon, $150,000 to the capital stock of any railroad company now organized, or that should be organized thereafter to construct a railroad, commencing at the city of Fort Scott, in the county and State aforesaid, running from thence west, north of the Marmaton River, upon the most practicable route in the general direction of Humboldt, Allen County, Kansas; and that the bonds of said county be issued to said company for the payment of said subscription, said bonds to be payable within thirty years from the date thereof, and bearing interest payable semi-annually, at the rate of seven per cent. per annum; provided that said bonds should not be issued until the question should be submitted to a vote of the qualified electors of the county of Bourbon, aforesaid, and should have received a majority of the votes cast upon said proposition in favor thereof, in pursuance of the provisions of the statute passed by the legislature of the State of Kansas, in such cases made and provided; and that said question should be submitted to said electors at a special election, to be held at the usual places of holding elections in said county, on Tuesday, the 24th day of August, A. D. 1869. At the said election the vote should be cast "for railroad bonds," and "against railroad bonds," and if it should appear upon a canvass of the votes cast at said election by the proper officers, according to law, that a majority of the votes cast upon said question were in favor of said subscription, then the above order should be carried into practical operation

by the issuing the bonds to said company, whenever the county commissioners of Bourbon County were satisfied that the bonds therein provided for, with the other resources of said company, should be sufficient and adequate to complete the construction of the road-bed, ready for the iron from the city of Fort Scott, to the west line of Bourbon County.

The bill alleges that the election took place, and that a majority of the votes of the people of the county were in favor of the subscription, and that the county commissioners, by a resolution passed on the 13th of Oct., 1870, after formally stating that the county commissioners had been authorized by this vote to subscribe the amount of $150,000 to the capital stock of any railroad company running westerly from Fort Scott, Kansas, through the County of Bourbon, on the north side of Marmaton River, in the general direction of Humboldt, Allen County, Kansas, and to issue the bonds of said county in the payment of said subscription, said bonds to be payable in thirty years from the date of issue, and bearing interest, payable semi-annually, at seven per cent. per annum, appointed Joseph S. Ebert of said county, subscription agent for said county, and authorized and directed him to subscribe for and in the name of Bourbon County, $150,000, to the capital stock of the Fort Scott and Allen County Railroad Company, upon the condition that said company, or their assigns complete the construction of their road-bed ready for the iron from Fort Scott to the western line of Bourbon County by the first day of July, 1872, and that said agent made the subscription upon the books of said company of $150,000 to the capital stock of said company for and in behalf of said county, that the municipality of the township of Humboldt subscribed $75,000, and the City of Humboldt, $25,000, to be paid in municipal bonds, and that these subscriptions constituted the entire capital stock of the company, with the

exception of about $10,000, very little of which was paid, and that the Fort Scott and Allen County Railroad Company, now the Fort Scott, Humboldt and Western Railroad Company, was organized on the basis of this subscription, for the purpose of building and operating the road.

That the County Commissioners of Bourbon County selected and appointed several citizens of that county to be present and cast the vote of said county at the several meetings of the stockholders of said railroad company, and also presented the names of several citizens of said county to act as directors, and that the persons so selected were elected and qualified, and exerted and continued to exert a controlling influence in the board of directors of said company—that on the 28th day of July, 1871, after considerable work had been done in the construction of said railroad, said Board of County Commissioners of Bourbon County, by a resolution of said board passed and recorded among the records of their proceedings, ratified and confirmed all their acts and proceedings respecting the making of said subscription to the capital stock of said railroad company, and the appointment of said directors of said railroad company, and by said resolution repledged the good faith of said County of Bourbon, in the making of said subscription, and declared their intention to conform to the terms thereof, and the conditions of the votes of the electors of said county, whereby they were authorized to take stock in said railroad company, and ordered that the bonds of said county be prepared as soon as the same could be lithographed, and be laid in the fire-proof safe in the vault attached to the treasurer's office of said county with the signature of the chairman to the bonds and coupons to wait the further action of said board. The bill further alleges, that the complainant entered into said contract with said railroad company for grading said railroad-bed, at the solicitation of the president and directors

of said railroad company, of which board, the directors representing said County of Bourbon had the controlling influence, and at the solicitation of said County Commissioners of said County of Bourbon, who assured complainant that the people of said county very much desired the building of said railroad, that the bonds of said county were legally voted, and would be delivered to said company, so that said company could perform its contract with complainant—that said County Commissioners were apprised of the fact, and very well knew that said railroad company had little or nothing wherewith to pay for the large outlay necessary to grade said railroad bed, other than said municipal bonds, and that at the time when said contract was made by complainant with the president and directors of said railroad company, the persons who were chosen directors for said County of Bourbon, by reason of said subscription, and the County Commissioners of said County of Bourbon were present, assisting, advising and consenting to the making of said contract, and that complainant entered into said contract relying upon the representations frequently and repeatedly made to him by the County Commissioners of said Bourbon County—that the subscription of said county to the capital stock of said company had been legally made, and that the bonds of said county would be issued therefor, and transferred to him when said road-bed should be completed in accordance with the provisions of said contract, and that at divers times, during the performance thereof, said board and the president and directors of said railroad company had numerous meetings for the purpose of transacting business incident to the constructing of said road-bed, and carrying into effect the object of said company, and the completion of said railroad, at all of which meetings the said directors, representing said Bourbon County, were present, and took part in all the transactions of said board

of directors as the representatives and agents of said county, and that complainant's only inducement to take said contract and make the large outlay of money to execute and perform the same, was the pledged faith of said Bourbon County in connection with that of the other municipal corporations mentioned in the bill, and their promise to pay up their said subscriptions to the capital stock of said company, and deliver the said bonds to said railroad company.

The bill further alleges that it was well known to all the inhabitants, citizens and legal voters of said county of Bourbon, while complainant was engaged in the performance of said contract, and long before the completion thereof, that said work was being done and moneys expended by complainant upon the faith that said county had subscribed $150,000 to the capital, and the assurance that it would issue its bonds therefor, and no opposition was ever made thereto by any of the inhabitants, property owners, or legal voters of said county. Bill alleges that complainant completed the road-bed of said railroad ready for the iron by the 1st day of June, 1872, and that the railroad company, by its president and directors, formally accepted and approved the work on the 6th of June, 1872, and passed a resolution declaring that complainant had fully and entirely discharged his obligations under said contract.

It was argued in support of the demurrer to the bill that in the proposition submitted to the voters of Bourbon County the name of the corporation in which the stock was to be taken was not mentioned, and upon this ground, under the authority of *Lewis* v. *County Commissioners of Bourbon County*, 12 Kan., 186, the demurrer was sustained and the bill dismissed by the court below.

This objection, and the Kansas case in support of it, was

fully considered by this Court in the case of *Commissioners, &c.*, v. *Thayer*, 4 Otto, 631, and overruled.

It was there held that the proposition submitted to the voters need only describe the location of the proposed railroad, and that it was not necessary that the particular road should be named ; that it was for the electors to determine whether the proposed burthen should be assumed, and for the county board to select the parties or corporation in which the stock should be taken.

Even if we were able to do so, we are not called upon to cite any authority in support of the doctrine here distinctly announced. It is true that in the case in Otto the bonds had been issued. But that circumstance is unimportant ; for the question there, as here, was, Was the choice which the electors actually expressed legally expressed, although in the proposition submitting the question to them of whether they would or would not assume this burthen for the purpose of accomplishing the object designated, the name of the corporation whose stock was to be subscribed for was not mentioned ? In answering this question the Court did not allude to the fact that the bonds had been issued, or that they were in the hands of *bona fide* holders ; but simply said that the statute did not require that the name of the corporation should be stated in the submission, or that the electors should exercise any choice on that subject.

## II.

### THE DISMISSING OF COMPLAINANT'S BILL WAS VERY INEQUITABLE.

The County Commissioners of Bourbon County projected a scheme for building a railroad from Fort Scott, the principal town in Bourbon County, to Humboldt, in Allen County.

They placed before the electors of Bourbon County a proposition to take stock in the name of the county in a corporation organized to build this road, the proposition containing a definite description of the contemplated road ; and expressly provided that the bonds of the county should be issued in payment of the stock whenever the county commissioners were satisfied that these bonds, together with the other resources of the company issuing the stock, were sufficient and adequate to complete the construction of the road-bed ready for the iron. A vote was actually taken and resulted in favor of making the subscription and issuing the bonds. A company called the Fort Scott and Allen County Railroad Company, was organized to build the road, and $150,000 of the capital stock of this company was duly subscribed for and taken by the county. The commissioners of the county participated in the organization of the railroad company, and persons representing the county were chosen to manage the company, and constituted a controlling influence in its management.

The subscriptions of Humboldt, and of minor municipal corporations, constituted the capital stock of the company. The complainant, by the procurement of the County Commissioners of Bourbon County, entered into a contract with the railroad company to construct the road-bed of the railroad, and make it ready for the iron, and to receive as his compensation for the outlay the municipal bonds that were to be issued in payment of this capital stock, of which those to be issued by Bourbon County were the most important. The expectation of receiving these bonds of Bourbon County was the main inducement to complainant's entering into the contract, and to stimulate this expectation the county commissioners from time to time during its performance assured him that the bonds should be given him as soon as the work was done, and for the purpose of giving him still further assurance, and

to encourage him to proceed with the work, they did on the 28th of July, 1871, formally direct that the bonds be prepared as soon as they could be lithographed, and that they be signed by their chairman, and placed in the vault of their treasurer's office, to await the further action of the board; and the inhabitants and voters of the county, who knew that complainant was proceeding with this work, expecting to be paid for it with these bonds, and that the company which employed him had no other means for paying him, stood silently by and did not intimate that any objection would be made to their issue. The complainant fully performed his contract, and his work was accepted by the company. The company has failed, and unless these bonds are issued and given to complainant he will entirely lose what he has expended upon this work. His title in equity to the bonds is complete, and if they are denied him he will suffer to the same extent that a party would suffer from being denied any remedy upon the bonds after he had purchased and paid value for them. To the extent of the sum covered by these bonds, Bourbon County has received and enjoys the consideration for which they were to be given, and this court has said that in such a case it is not bound to follow the decision of a State court, which releases the people of that county from all corresponding obligations.

*Commissioners, &c.*, v. *Thayer*, 4 Otto, 642.
*Gelpcke et al.* v. *City of Dubuque*, 1 Wall., 175.
*Bulls* v. *Muscatine*, 9 Id., 571.
*Olcott* v. *The Supervisors*, 16 Id., 678.

In fact an estoppel in such case arises.

*The People* v. *Logan County*, 63 Ill., 385, 386.
*Johnson* v. *County of Stark*, 24 Ill., 90.
*Prettyman* v. *Tazewell County*, 19 Ill., 44.

*The People* v. *Kline*, 63 Ill., 398.
*Supervisors* v. *Schenck*, 5 Wallace, 772.
*Alcott* v. *Supervisors*, 16 " 698.
*City of Lexington* v. *Butler*, 14 " 283.
*Pendleton County* v. *Amy*, 13 " 298.
*Meyer* v. *Muscatine*, 1 " 385.
*Knox County* v. *Aspinwall*, 21 Howard, 544.
*Lynde* v. *County*, 16 Wallace, 6.
*St. Joseph Township* v. *Rogers*, 16 Wallace, 644.
*Pine Grove* v. *Talcot*, 19 Wallace, 666.

## III.

THE OBJECTION THAT THE BILL IS MULTIFARIOUS CANNOT PREVAIL.

" By multifariousness in a bill," says Mr. Justice STORY, " is meant the improperly joining in one bill distinct and " independent matters, and thereby confounding them, as, " for example, uniting in one bill several matters perfectly " distinct and unconnected against one defendant, or the " demand of several matters of a distinct and independent " nature against several defendants in the same bill."

Story Eq. Pl., § 271.

" The conclusion," says Mr. Justice STORY, " to which " a close survey of all the authorities will conduct us, " seems to be that there is not any positive inflexible rule " as to what in the sense of courts of equity constitutes " multifariousness, which is fatal to a suit on a demurrer."

Story Eq. Pl., § 539.

*Oliver* v. *Piatt*, 3 How., 333, 411, 412.

The substance of the rule is that each case is to be governed by its own circumstances, and must be left in a great measure to the sound discretion of the court.

*Gaines* v. *Chew*, 2 How., 619.

In the above case, the court say, on page 642 :

"Whilst parties should not be subject to expense and "inconvenience in litigating matters in which they have no "interest, multiplicity of suits should be avoided by unit- "ing in one bill all who have an interest in the principal "matter in controversy, though the interest may have "arisen under distinct contracts.

"Where the purpose of the bill was to enable the plain- "tiff to obtain satisfaction of a judgment at law out of the "property of his debtor—one of the defendants; and to "this end the plaintiff sought to remove out of his way "certain fraudulent conveyances and incumbrances, and to "bring within the reach of his judgment equitable inter- "ests, which were not the subjects of execution at law, it "was held to be no objection that one or more of the de- "fendants, to whom parts of the property had been fraud- "ulently conveyed, had nothing to do with other fraudu- "lent transactions. Chancellor Green said : 'The case "against the debtor is so entire that it cannot be prosecuted "in several suits, and yet each of the defendants is a "necessary party to some part of the case stated. In such "case neither of the defendants can demur for multi- "fariousness, or for misjoinder of causes of action, in some "of which he has no interest.' *Way* v. *Bragan*, 1 C. E. "Green (N. J.), 213, 216; *Randolph* v. *Daly*, 1 C. E. "Green (N. J.), 313; see *Boyd* v. *Hoyt*, 5 Paige, 78; "*Brinkerhoff* v. *Brown*, 4 John. Ch., 671; *Fellowes* v. "*Fellowes*, 4 Cowen, 682; Story Eq. Pl., § 271 *b*; *Hicks* v. "*Campbell*, 4 C. E. Green (N. J.), 183; *Coleman* v. "*Barnes*, 5 Allen, 374; *Cuyler* v. *Moreland*, 6 Paige, 273; "*Richards* v. *Pierce*, 52 Maine, 560; *Chase* v. *Searles*, 45 "N. H., 511, 519, *et seq.*; *Morton* v. *Weil*, 33 Barb., 30."
1 Dan. Ch. P., 338, *note*.

The object of the bill is to compel the County of

Bourbon to execute these bonds in payment for the stock which was subscribed for in its name, and in pursuance of its agreement to issue them upon which the complainant relied in making this large expenditure, and to give them to the complainant, either with or without the intervention of the railroad company. From the statements of the bill, that county is the only party that can make any defense to the suit, and yet the railroad company is a necessary party, for the bonds were to be given to that company for the use of complainant.

MILLER & FROST,
*For Appellant.*

IN THE

# Supreme Court of the United States,

No. 228.

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FRANKLIN C. SMITH, Appellant,

*vs.*

THE FORT SCOTT, HUMBOLDT AND WESTERN RAILROAD COMPANY, and THE COUNTY OF BOURBON, et al., Appellees.

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## BRIEF IN REPLY.

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MILLER & FROST,

Attorneys for Appellant.

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1879.

IN THE

# Supreme Court of the United States,

No. 223.

FRANKLIN C. SMITH, Appellant,

*vs.*

THE FORT SCOTT, HUMBOLDT AND WESTERN RAILROAD COMPANY, and THE COUNTY OF BOURBON, et al., Appellees.

## BRIEF IN REPLY.

The ground on which the demurrer to the bill in this case was based, and upon which the bill was dismissed, is, that the Supreme Court of the State of Kansas, in the case of *Lewis* v. *The County Commissioners of Bourbon County*, 12 Kansas, 186, decided that there was no power by virtue of the vote taken under the statute of Kansas, authorizing counties of the State to own railroad stock, and issue bonds in case the voters of the county so decided at a general or special election called for that purpose, to take railroad stock in and issue bonds to, a railroad company, which had no existence when the vote was taken. It is argued that this decision of the State court is controlling

and decisive upon the question at bar, because the Fort Scott and Allen County Railroad Company, now the Fort Scott, Humboldt and Western Railroad Company, was not organized as a corporation until after the vote was taken, the election being held on the 21st day of August, 1869, and the railroad company not becoming duly incorporated until October 2, 1870. That consequently there was no power under the statute and by virtute of the vote in the county, to take stock or issue bonds. Under this statute, as construed by the Supreme Court of the State of Kansas, no legal or valid vote can be taken upon the subject by the people of the county, as to any except an existing corporation, and the corporation must be named that is to receive the proposed subscription and bonds.

The Supreme Court of the United States, however, in the case of *The Commissioners* v. *Thayer*, 4 Otto, 641, overruled this decision of the State court, and held, moreover, that as in that case the Supreme Court of the State had the power to enquire into the number of votes actually cast for and against the proposed issue of bonds, and upon making such inquiry, found and determined a majority of the votes cast in that particular case were against the proposition, that the rest of the opinion was *obiter dictum*, and could not control the decision of this court. In that case bonds had actually been issued.

In this case no bonds had been issued, and the question is not as to the effect and validity of negotiated bonds, but as to whether in fact we are entitled to have bonds issued. This question, however, was decided in that case. The court did not hold simply that the bonds were good because they were negotiable paper, and being actually negotiated, their regularity could not be questioned; but the court went further and held, that an election to take stock to issue bonds to a railroad company complying with the

terms of the vote, applied under the statute as well to a company thereafter organized, as to a company then in existence and named in the statute.

The question arose under the same statute as that construed by the Supreme Court in the 12th of Kansas. We have thus the two decisions, one of the Supreme Court of the State, and one of the Supreme Court of the United States, directly opposed to each other, and the question is, which shall control the decision of the case at bar? We might rest, perhaps, upon the decision of the Supreme Court of the United States, and upon the reasons there given for not following the opinion of the Supreme Court of the State upon that question. We, however, prefer to adduce additional reasons and authorities for following the judgment of this court, and for showing that it controls the case at bar, and that the same should be decided in accordance with that case.

The first ground which we assign, is, that the case clearly involves a *federal question;* and inasmuch as it involves a federal question, the federal court is not bound by the decision of the State court.

The contract in this case was made in June, 1871, with the railroad company, and as early as that date, between Bourbon County and the complainant, and the contract was completed, and the entire work stipulated for was finished in June, 1872.

The adverse decision of the State court upon the true construction of this statute, was not made until July, 1873. Up till that date, no intimation had been received from any department of the government that the contract was not valid, and that there was not ample power on the part of Bourbon County under the statute, and by virtue of the vote taken by the people of the county, to take the stock of the company and issue the bonds. The contract was

made, and the entire work was done under it before this decision of the State court was made.

The Supreme Court of the United States, moreover, has virtually decided that this contract *was valid* when it was made, and that the objection now interposed is untenable and unsound, and all the parties have acquiesced in its validity, and have acted in perfect good faith in its performance. There is, therefore, involved in this case the question as to whether this contract is or is not inviolable, and whether this court is not bound to protect the parties that performed it in good faith.

This court has repeatedly held that it is bound to protect parties who have parted with their money and their property upon the faith of such a contract, not only against the acts of the legislature of the State tending to impair such a contract, but also against the decisions of the judiciary of the State making it nugatory. That it is the duty of the court to see that the contract is not impaired, either in the one way or the other.

The decisions on this subject have been so numerous, and the principles there so well settled, that we hardly need to cite authority to settle the rule we contend for, as the established doctrine of this court.

In the case of *The Township of Pine Grove* v. *Talcott*, 19 Wall., 678, the language of this court upon this subject, is as follows, viz:

"The National Constitution forbids the States to pass "laws impairing the obligation of contracts. In cases "properly brought before us, that end can be accom- "plished unwarrantably no more by *judicial decisions* than "by legislation. Were we to yield in cases like this to "the authority of the decisions of the courts of the re- "spective States, we should abdicate the performance of "one of the most important duties with which this tribu-

" nal is charged, and disappoint the wise and salutary pol-
" icy of the framers of the constitution in providing for
" the creation of an independent Federal Judiciary."

So in the case of *Olcott* v. *Supervisors*, 16 Wall., 690, this court say:

" This court has always ruled, that if a contract when
" made was valid under the constitution and laws of a
" State, as they have been previously expounded by its
" judicial tribunals, and as they were understood at the
" time, no subsequent action of the legislature, or the ju-
" diciary, will be regarded by this court as establishing its
" invalidity. Such a rule is based upon the highest prin-
" ciples of justice. Parties have a right to contract, and
" they do contract, in the view of the law as declared to
" them at the time their engagements are formed. Noth-
" ing can justify us in holding them to any other rule
" * * *"; and the court say, in reference to the facts in that case, " that the orders were issued in February, 1869,
" and that it was not until 1870 that the Supreme Court
" of the State decided that the uses for which taxation
" was authorized by the statute of April 10th, 1867, were
" not public uses, and, therefore, that the statute was in-
" valid."

In the case of the *Ohio Life Insurance and Trust Co.* v. *Debolt*, 16 How., 432, the rule is laid down thus, by Chief Justice TANEY, viz., referring to the case of *Ronan et al.* v. *Runnels*, 5 How., 134, he said: " And the court
" then said that it would always feel itself bound to re-
" spect the decisions of the State courts, and from time
" to time, as they were made, would regard them as con-
" clusive in all cases upon the construction of their own
" constitution and laws, *but that it ought not to give them*
" *retroactive effect, and allow them* to render invalid con-
" tracts entered into with citizens of other States, which,
" in the judgment of this court, were lawful at the time

"they were made. It is true the language of the court is "confined to contracts with citizens of other States, be- "cause it was a case of that description which was then "before it; but the principle applies with equal force to "all contracts that come within its jurisdiction. * * "The writ of error to a State court would be no protec- "tion to a contract, if we were bound to follow a judg- "ment which the State court had given, and which the "writ of error brings up for revision here; and the sound "and true rule is, that if the contract when made was "valid by the law of the State, as then expounded by all "the departments of its government, and administered by "its courts of justice, its validity, and its obligation cannot "be impaired by any *subsequent* act of the legislature of "the State, or decision of its courts altering the construc- "tion of the law."

These cases show, as well as various others that might be cited, that under the rule as laid down by the Supreme Court of the United States, and regarded as established, the question of the inviolability of this contract, under the Constitution of the United States, fairly arises under the decision of the State court; and if it does, in fact, arise, *then* it is the duty of this court, under the rule also laid down in similar cases, to exercise its own independent judgment as to the validity of the contract, although that question depends upon the construction of the State statute. The duty of the court, in such case, is to protect the rights of the parties against an adverse decision of the State court, just as much as it would be to protect their rights against an express act of the legislature of the State directly impairing its validity. If, when the contract was made, it was good and valid, as this court has virtually held, and nothing had been decided by the State court in any way invalidating it, then the parties to it are entitled to protection under it, and the subsequent decis-

ion of the State court, adverse to it, cannot render the contract void. Whenever this question fairly arises, and the State decision is subsequent to the execution and performance of the contract, then this court is not bound by the local statute, or the local decision, but acts under the express authority of the Constitution of the United States, which requires it to act upon and to decide the question involved according to right and justice, and unfettered by the actions of State tribunals, for the very question to be passed upon is, whether by its legislature, or by its judiciary, the State has impaired the obligation of the contract, and contravened in this respect the Constitution of the United States.

The same ruling as that for which we contend will be found in the following cases:

*Gelpcke* v. *City of Dubuque*, 1 Wall., 175.
*Havemeyer* v. *Iowa Co.*, 3 Wall., 294.

There is no question whatever as to the facts. The contract was made, acted upon and fully performed before this decision of the Supreme Court of the State of Kansas was actually made. It was made in good faith. Parties thereto relied upon it. It was performed on the one side, and was acquiesced in and accepted by the other side, in full faith, belief and assurance that when the consideration was received, and the work done on the one part, that the bonds would be forthcoming on the other part; and such a contract, thus made and performed in good faith, and held by this court itself in the case of *The Commissioners* v. *Thayer*, 4th Otto, 642, to be perfectly valid, cannot be rendered nugatory by a subsequent decision of the State Court.

II.

The decision in the 12th of Kansas, already referred to, has no application here, upon the ground that the other

party has received the full consideration stipulated for in the contract, and it is not permissible in such case for the party who has received the benefit of the contract to assail the same as irregular and void.

In the case of *Pine Grove* v. *Talcott*, 19 Wall., 678, this court adopts the following citation from Sedgwick on Statutory and Constitutional Law, as well sustained by reason and authority:

"It must be further borne in mind that the invalidity of "contracts made in violation of statutes, is subject to the "equitable exception that, although a corporation, in mak- "ing a contract, acts in disagreement to its charter, while "it is a simple question of capacity or authority to con- "tract arising on a question of regularity of orgzanization, "or a power conferred by the charter, a party having the "benefit of the agreement cannot be permitted by an ac- "tion founded on it to question its validiiy. It would be "in the highest degree inequitable and unjust to permit "the defendant to repudiate a contract the fruits of which "he obtains. And the principle of this exception has "been extended to other cases. So a person who has "borrowed money of a savings institution upon his "promissory note, secured by a pledge of bank stock, is "not entitled to an injunction to prevent the prosecution "of the note upon the ground that the savings bank was "prohibited by its charter from making loans of that de- "scription. The authorities referred to sustain the text."

To the same effect is the case of

*The People* v. *Cline*, 63 Ill., 398.
*People* v. *Logan County*, 63 Ill., 385.
*Johnson* v. *County of Stark*, 24 Ill., 90.
*Prettyman* v. *Supervisors of Tazewell Co.*, 19 Ill., 406.

The language of the court in these two latter cases is

striking. The court say in the case of *Johnson* v. *County of Stark* :

" Counties have no right to procure all the benefits of " an act which they were authorized to perform, recog- " nized and acted upon by them as legal, and then escape " liability, any more than have private individuals. They " must respond to their engagements to the same extent " as individuals."

In the case of *Prettyman* v. *Supervisors* — where the bonds were asked for, and the question was whether an injunction should be allowed against their issuing the bonds — the court say:

" Justice and reason will alike prohibit a party, after ac- " quiescing until the road should incur liabilities, acquire " credit, or procure individual subscriptions on the faith " that these bonds would issue, from impeaching the elec- " tion, and enjoining them from issuing."

There would seem to be no good reason why a county and its public officers should not be estopped from questioning the validity of their own contract, and proceedings, when they have had the full benefit of the contract, and proceedings so taken, and the consideration has been received by them, as well as a private individual.

The same injustice attaches to the matter in the one case as in the other. The same reason exists for an estoppel in one case as in the other.

## III.

There is no ground for the demurrer, because the claim is obnoxious to the exception contained in the first section of the Act of March 3d, 1875, touching the jurisdiction of the court, which withdraws from the jurisdiction of a Circuit or District Court of the United States " any suit

"founded on contract in favor of an assignee, unless a "suit might have been prosecuted in such court to recover "thereon, if no assignment had been made, excepting in "cases of promissory notes, negotiable by the law of Mer- "chants and Bills of Exchange."

This provision is intended to cut off any attempt to ob- obtain jurisdiction by a mere assignment. Where the whole subject matter of the claim exists exclusively in one party, who was alone originally vested with the right of suit, and he makes a transfer to another party, the party to whom the transfer is made being a non-resident, while the original party is a resident, jurisdiction over the claim cannot be thus acquired.

This suit is not upon an assigned claim. Its object, amongst other things, is to compel an assignment. There is no assignment unless by operation of law. The question is, whether we are entitled, by virtue of what has been done, to have issued and transferred to us the bonds in controversy.

The complainant has substantial rights which he *originally* obtained, not by a mere assignment, but by direct contract between himself and the party defendants, and by reason of their conduct in the premises.

The bill alleges, if you please so to term it, a tripartite contract, as it were, between the complainant, the railroad company and the County of Bourbon, and by force of the acts of each of these parties, and of a contract to which they all virtually became parties, and upon the performance of said contract by the complainant, he became entitled to the bonds in controversy, and to a specific performance of the contract in respect thereto, and a clear case is presented for the interposition of a court of chancery, and to which the exception of the statute has no sort of application whatever. The complainant is not only

equitably entitled to be subrogated to all the rights of the railroad company in the premises, but also to the benefit of the original arrangement between the three parties, which, of itself, entitles the complainant to the bond.

## IV.

The gross injustice involved in this defense, is a strong reason why the complainant should be allowed to prevail. It is nearly five years since the work was done. The party is fairly entitled to his money, and it is grossly unjust to allow a party, by virtue of a technicality of this character, to evade the payment of a just debt, and to bring ruin upon the complainant by involving him in large expenditures and obligations which he is illy able to meet, upon the repeated assurance that the contract and vote were valid, and that the bonds would surely be forthcoming when the work was done.

In this connection it is proper to notice some other objections made by the defendants to sustaining the bill in this case. It is said that a decree for specific performance is not "a matter of absolute right. That it is always sub-"ject to the sound and equitable discretion of the court." That it is "manifestly inequitable to issue $150,000 bonds "to a corporation, which is shown by the bill to be irre-"trievably insolvent." This is a singular argument to be used by the very party by whose failure to meet its just obligations the company has been brought to the brink of insolvency. Had the county done its duty, all would have been well. A good road would have been in practical operation. But whether this result would have followed or not, the complainant and the railroad company have, so far as the county is concerned, filled their contract, completed their work fairly and in good faith. To furnish

the iron, and the rolling stock, and complete the road, and put it into practical operation, were not what they undertook to do. The road-bed, bridges and culverts, were built, and all that the contract called for was completed—whether the requisite amount was afterwards raised necessary to the completion of the road, and proper measures were taken for this purpose or not, were wholly immaterial, and can properly furnish no argument whatever against granting the relief asked by the bill. That was not the complainant's business, nor the business of the company, and cannot be legitimately relied upon as constituting, in whole or in part, a defense to this suit.

The failure of the county to pay these contractors and issue bonds as agreed, destroyed its credit, and was notice to the world that contractors could not rely upon its agreement. Whereas, in all probability, had the bonds been issued, and the credit of the county not been dishonored, no serious obstacle would have been encountered in completing the road, but its practical operation and completion would have been fully secured.

For the county now to set up its own wrongful acts and failures to meet its obligations, as a reason why the relief which the law gives as a remedy for such violation, should not be afforded to the injured party, is neither good logic nor good law, and only illustrates the spirit of wrong and injustice which seems to prompt persistent resistance to the payment of honest debts.

The bonds in this case, if the bill is sustained, do not go to an insolvent railroad company, but to the parties who have done the work and earned the wages for which the bonds of the county were to constitute the chief compensation. They are entitled to the benefit of them, and in law and justice ought to have them.

The bill moreover prays for such other relief as the

court may see fit to grant. The liability of the county is established by the facts averred in the bill, and may be enforced either by the issue of bonds or in any other way consistent with the facts, or appropriate to the case, in the judgment of the court. It is said, we "seek to inject "equities into our claim by allegations of representations "of the county commissioners that the bonds were legally "voted, and would be issued, that the subscription to the "stock had been made," etc.

Representations to constitute an estoppel, it is argued, must be matters of fact, not mere promises *in futuro*, "such" as the opposite party "had the right to rely on." "The party making them must have had authority to "make them." "That their representations were simply "the volunteer declarations of the persons making them," etc.

The parties making these statements were the authorized agents of the county, and engaged in the business of the county, and empowered to represent the county in reference to this very railroad company, of which the ounty itself was an integral part. Their conduct and the acts have special reference to the accomplishment of this railroad enterprise.

The fact is that the county of Bourbon, by its commissioners, as appears from the bill, and as stated on page 25 of the printed abstract, by its formal *record* represented in so many words that "upon a proposition submitted to the "electors of Bourbon County, Kansas, on Tuesday, the "24th day of August, 1869, the Board of County Com-"missioners of said county were authorized to subscribe "the amount of $150,000 to the capital stock of any rail-"road" having the course and direction such as the railroad in question had, and this affirmation was contained in the very same instrument, authorizing and directing the commissioners of Bourbon County to subscribe in the

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name of said county $150,000 to the capital stock of the Fort Scott and Allen Co. R. R. Co. Here is a representation directly by the principal, which must bind, if any representation can bind, in a negotiation with a contracting party.

The commissioners were supposed to have special knowledge of what the county had done, and how it had bound itself in the premises. Their acts and their statements were not the acts and statements of third persons, or of "mere "volunteers." The only way the county can act or do business is through its official representatives and agents. What they say and do, parties negotiating with them in reference to the business of the county have a right to rely upon, and by their representations and acts, the faith of the county can be properly pledged. Counties are just as much bound by statements and promises made by their official representatives, as are natural persons, and are as much bound by the principles of justice and equity as are natural persons. An estoppel can as well be raised against those public corporations by their acts and conduct as against private individuals. They may take such a course of conduct as to influence those who are negotiating with them, and by word and deed may estop themselves from going counter to their acts or representations.

It is in vain to impugn the motives of contractors, or to try to escape liability by characterizing the work done as "a few bridges, cuts and embankments to disfigure the "face of the country." They have done as they agreed, and have performed the work required, and as required, and there is no fault to be laid to their charge.

"The laborer is worthy of his hire." That the employer or the guarantor is the public corporation known as the county, can make no difference. The rule of law and justice is the same in either case.

That the ultimate design was to secure a completed railroad cannot alter the case. There is nothing from beginning to end of the matter to impair in the slightest degree the good faith either of the railroad company or the contractors, and because the county chose to leave the rest of the work unprovided for, is no reason why they should not pay for work already done, which is a full and adequate consideration for the bonds to which the complainant is entitled. There is no ground for the objection to the bill as multifarious.

The cases cited in our original brief constitute a perfect answer to this objection. A bill is not multifarious simply for the reason that different defendants are embraced in the suit, or that they have not precisely the same identical interest in the matter. It is said: "The contract between "the complainant and the railroad company is one thing, "the contract between the railroad company and the "county is another." If by this language is meant that there are two contracts involved, that is true, but if it is meant to be asserted that these two contracts are entirely separate and independent, having no connection whatever with each other, then it is utterly untrue. If the two contracts appertain to the same general subject, and relate to each other as well as the subject matter of the suit, there is a direct interest on the part of each defendant, which interests, though not identical, are closely and directly connected. To refer again to the citation from the opinion of this court in the case of *Gaines* v. *Chew*, 2 How., 642, on page 20 of our original brief in this case: "Multiplicity of suits," says Justice McLean, in delivering the opinion of the court, "should be avoided, by uniting in one bill all who have "an interest in the principal matter in controversy, though "the interests may have arisen under distinct contracts." In that case the complainants made defendants not only the executors of the will of Daniel Clark, by which real and

personal property was devised, the right to which property was in controversy, but made also all other persons parties to the bill who had come to the possession of the property, real and personal, by purchase or otherwise, which belonged to Daniel Clark at the time of his death. As is said here, so might it be said there ; the appellees have no joint interest in their contracts, yet are compelled to defend both, as though their interests were joint.

It is wholly unnecessary, in order to free the bill from the charge of multifariousness, that the interests of all the defendants should be joint, any more in this case than in the one cited. It is necessary that there should be some connection between the interests of the different defendants. It is not necessary that they should be identical, nor is it necessary that they should be joint. It is necessary that there should be some connection between them, or with the subject matter of the suit, of such a character as to make it necessary or proper that they should be united together in the same case.

The true rule is well expressed by CHANCELLOR GREENE, whose language can be found on page 20 of said original brief, in which he says : "The case against the debtor is "so entire, that it cannot be prosecuted in several suits, "and yet each of the defendants is a necessary party to "some part of the case stated. In such case, neither of "the defendants can demur for multifariousness, or for "misjoinder of causes of action, in some of which he has "no interest."

And in Daniel's Practice, Vol. 1, page 337, the same rule is thus laid down, viz : "That where the plaintiffs have a "common interest against all the defendants in a suit as to "one or more of the questions raised by it, so as to make "them all necessary parties for the purpose of enforcing "that common interest, the circumstance of some of the

"defendants being subject to distinct liabilities in respect to "different branches of the subject matter, will not render "the bill multifarious." Both contracts had reference to the bonds, which bonds, or their equivalent, are sought to be secured by this bill. The complainant, by his contract with the railroad company was entitled, upon its fulfillment by the terms of the contract, to the bonds in question. The work was done by the complainant, and, although done by the contractor, entitled the railroad company to the bonds when the company's contract with the county had been performed by means of the work done by the complainant.

The other facts alleged in the bill make substantially a three-fold contract between the complainant, the railroad company and the county, which being fully performed, gives, in equity, to the complainant the title to the bonds, and the right to have them furnished to him by the county, so that each party is directly interested in the subject matter of the suit. All the parties are interested in the determination of the question of whether the work has been done and the contracts fulfilled, and in the question whether the complainant is entitled to the bonds or their equivalent from the County of Bourbon.

MILLER & FROST,
*Att'ys for Appellant.*

IN

# SUPREME COURT OF UNITED STATES.

FRANKLIN C. SMITH,

*vs.*

THE FORT SCOTT, HUMBOLDT, AND WESTERN RAILROAD COMPANY, AND THE COUNTY OF BOURBON *et al.* } *No. 223.*

*APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.*

## BRIEF AND ARGUMENT OF J. E. McKEIGHAN, OF COUNSEL FOR APPELLEES.

*Press of G. I. Jones & Co., St. Louis.*

# IN THE SUPREME COURT

OF THE

# UNITED STATES.

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FRANKLIN C. SMITH,

*Appellant,*

*vs.*

THE FORT SCOTT, HUMBOLDT, AND WESTERN RAILROAD COMPANY, THE COUNTY OF BOURBON, STATE OF KANSAS, AND THE COUNTY COMMISSIONERS OF BOURBON COUNTY, STATE OF KANSAS,

*Appellees.*

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## ABSTRACT OF CASE.

On August 7, 1875, the appellant filed his bill of complaint against the appellees.

The bill alleges, substantially, that he is a citizen of the state of Illinois; that the appellees are bodies corporate and politic, and citizens of the state of Kansas; that in June, 1871, the appellee railroad company (under its then name of Fort Scott and Allen County Railroad Company) entered into a contract with the firm of F. C. Smith & Co., by which, for certain bonds thereafter to be delivered to

said F. C. Smith & Co., they agreed to construct a railroad-bed from Fort Scott to Humboldt, Kansas, and necessary bridges and culverts for the same, and put the same in condition to receive the iron by July 1, 1872; that, among other things, said railroad company agreed to deliver to said F. C. Smith & Co. $125,000 of the bonds of Bourbon County, as follows: $100,000 when a certain amount of work was done, and the other $25,000 when the road-bed was fully completed; that John Dunn, partner of said Smith, assigned to complainant all his interest in said contract; that the complainant has duly performed his part of said contract, and is entitled to said bonds from said railroad company.

It is alleged against said Bourbon County and its commissioners that, having in view the financial and material interests of said county, the commissioners passed a resolution "that an election be called to determine whether or not the board should be authorized to subscribe $150,000 of stock to *any railroad company now organized, or that shall be organized*, that shall construct a railroad from Fort Scott to Humboldt, and that the bonds of the county be issued for the payment of said stock, payable in thirty years from date; *provided*, that said bonds should not be issued until the question should be submitted to a vote of the people, at an election to be held on August 24, 1869; that if it should appear that a majority of the votes cast were in favor of such subscription, then the above order shall be carried into practical effect, whenever the County Commissioners were satisfied that the bonds therein provided for, with the other resources of said company, should be sufficient to complete the construction of the road-bed, ready for the iron, from the city of Fort Scott to the west line of Bourbon County." It is alleged that due notice was given of the election, and that a majority of the votes cast were for the proposition; that *afterwards*, in October, 1870, the Fort Scott and Allen County Railroad Company was organized, to build a railroad from Fort Scott to Hum-

boldt, and on October 13, 1870, the commissioners of said county, on the application of said company, appointed J. S. Emmert subscription agent for said county, to make said subscription to said company, on the condition that said company shall complete the construction of its road-bed from Fort Scott to the western line of Bourbon County by July 1, 1872.

It is alleged that Emmert made the subscription, and that this subscription, together with the subscriptions of Salem and Humboldt Townships and the city of Humboldt, constituted *the entire capital stock of said railroad company*, save the small sums subscribed by individuals, not to exceed the sum of $10,000, *very little of which was paid.*

It is alleged that the commissioners named persons who were selected as directors of the company; that the commissioners frequently represented to the complainant that the bonds were legally voted, and would be issued to the railroad company whenever the road-bed should be constructed, and that he was induced by such representations to enter into said contract with the railroad company; that, notwithstanding all these facts, the county refuses to issue the bonds, and has imposed new conditions; that the said railroad company is utterly insolvent, and a judgment against it would be worthless.

The bill concludes with a prayer that an order be made against said railroad company, ordering it to assign to the complainant its claim against the county for said bonds, and the township of Salem, and that the said commissioners be ordered to issue said bonds and deliver them to the complainant.

The defendants were duly served with subpœna, and on September 2, 1875, entered their appearance and filed a demurrer to complainant's bill, stating as ground of demurrer that "the complainant does not, by his said bill, make such a case as entitles him, in a court of equity, to any relief from or against said defendants, or either of them, and that the said bill is wholly insufficient in law."

On November 30, 1875, defendants filed a demurrer, specifying as additional grounds of demurrer to the bill that "the bill shows on its face that the court has no jurisdiction," and that the bill is multifarious.

The demurrers were argued in the Circuit Court on December 2, 1875, and were sustaind, leave being given to complainant to amend his bill, if he so elected, by January rule-day.

On December 24, 1875, the complainant filed his amended bill, which, neither in substance nor form, is different from the original bill, except that in the prayer he does not ask for an assignment of the railroad's claim against Salem Township.

On January 7, 1876, the defendants, by consent, refiled their original demurrers as demurrers to the amended bill, which on June 6, 1876, were again sustained by the court and the bill dismissed.

## POINTS AND AUTHORITIES.

1. The bill seeks two things: First, to have a contract between the railroad company, a Kansas corporation, and Bourbon County, a Kansas county, assigned to him; secondly, to enforce specific performance of this contract. The Circuit Court has no jurisdiction of this case, inasmuch as the railroad company could not sue in that court.

U. S. Stat. at Large 1873–5, p. 470, Act of March 3, 1867;
U. S. Rev. Stat. 109;
Gibson *v.* Chew, 16 Pet. 315.

The restriction applies as well to equitable as legal assignments.

Sere *v.* Pilot, 6 Cranch, 332.

The restriction must apply to this case, because if the

railroad company has any claim against the county, which the Circuit Court decided it has not, it must be one arising on contract; the authority given by the election, the application for the subscription by the company, the performance of the conditions, and the subscription constituting such contract.

Aspinwall *v.* Commissioners, 22 How. 364.

2. The bill is multifarious. Two distinct issues must be tried, in which the defendants are severally, and not jointly, interested.

Story's Eq. Pl. 271–279.

3. It would be inequitable to compel the county to issue its bonds to an insolvent corporation, which has no capital except a few municipal subscriptions. A court of equity will not decree specific performance where, from a change of circumstances, it would be unconscientious.

Mechanics' Bank *v.* Lynn, 1 Pet. 376;
Cathcart *v.* Robinson, 5 Pet. 263;
Mississippi & Missouri R. Co. *v.* Cromwell, 91 U. S. 643.

4. The hopeless and utter insolvency of the railroad company furnishes at least equal equities to the county in resisting specific performance as to the complainant in asking it.

5. This is an action to compel the execution and delivery of bonds under a Kansas statute. The construction placed on a statute by the Supreme Court of the state controls, where no general commercial law is concerned.

Ewing *v.* City of St. Louis, 5 Wall. 413;
Olcott *v.* Supervisors, 16 Wall. 678;
Peik *v.* North-western R. Co., 94 U. S. 164.

The Supreme Court of Kansas decided that under the law of 1865, authorizing subscriptions to railroad companies and the issue of bonds to pay therefor, an order for an election must name the corporation to whom the bonds were to be issued, or such order and all subsequent proceedings would be void.

Lewis *v.* Bourbon County, 12 Kan. 186;
Thayer et al. *v.* Commissioners of Miami County, 11 Kan. 234.

The act of 1869 (Laws 1869, p. 109, sec. 2) is the same in this respect as the act of 1865, except that the company must be a resident corporation. The order for an election in this case did not name any railroad company (pp. 6, 23, 24, of printed record).

## ARGUMENT.

We think any one of the foregoing points sufficient to obtain an affirmance of the Circuit Court.

1. The Circuit Court, however, waived the consideration of all the points made except the failure of the order to designate the railroad company, which failure the court very promptly held was fatal to complainant's bill, inasmuch as it is sought to compel the issuance of the bonds. The decision of the Kansas Supreme Court was held conclusive of the question.

We think this is the established doctrine of this court; and although this court held, in Commissioners of Johnson County *v.* Thayer, 4 Otto, 631, that the Kansas statute did not require the corporation to be named, that decision does not change the rule nor its application to this case.

The cases in 4 Otto and 16 Wall. are cases where bonds had been issued and transferred to innocent holders.

The question of law involved in those cases had advanced from the construction of a mere local law to the wider field

of commercial law, affecting the rights of citizens of other states, who are not, perhaps, required to know or to anticipate the construction of the state courts, and who, purchasing their bonds in the open market, were entitled to the protection of the principles of the commercial world, as they might be construed by the tribunal selected by them.

But here the complainant is not invoking any general law. He is not asking the court to say, as in Olcott *v.* Supervisors, whether or not the powers of a state government are adequate to compel, by taxation, the payment of railroad bonds; nor, as in Johnson County *v.* Thayer, whether or not his right to ask payment is not protected by the principles of commercial law; but he is asking the aid of the court to force the issuance of bonds under a local law. It is the machinery of that law which he seeks to put in motion.

It would be difficult to conceive of a case in which the decision of a state court, construing its own laws, could be more applicable. As was decided by this court in Ewing *v.* City of St. Louis, 5 Wall. 413, the complainant "can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts." If in the latter courts equity would afford no relief, neither will it in the former.

The purchaser of municipal bonds in the market is only held to enquire whether the law of the state authorizes such bonds to be issued. If it does, then he may rely on the commercial law of the world, without regard to the particular decisions of that state. But he who makes a contract for bonds to be issued, and which can only be issued under the authority of a local statute, submits himself to the interpretation which the state court may put upon the law, and he takes the risk of its construction being favorable or unfavorable to him. As the state made the law, it may, as to him, construe it.

2. The Circuit Court had no jurisdiction. The Judiciary Act of 1879 would undoubtedly be held broad enough to

exclude this case from the jurisdiction of the Circuit Court. The right of complainant, if any existed, to obtain the bonds of the railroad company is a *chose in action;* its contents are the bonds themselves, or their value. The right of the railroad company to receive the bonds from the county is also a *chose in action.*

But the language of the act of March 3, 1875, is still more comprehensive. It provides that Circuit Courts shall not "*have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made,*" except in cases of promissory notes negotiable, and bills of exchange.

The complainant might sue the railroad company in the Circuit Court either at law, to recover damages for the breach of his own contract, or in equity, to compel specific performance; but he cannot ask for an assignment to him of the contract between the appellees, two Kansas corporations, and claim in a United States court specific performance of that contract so assigned. The railroad company could not go into the Circuit Court for relief, and for the same reason its would-be assignee cannot. The complainant cannot stand in any better position than if the railroad company had voluntarily assigned its contract to him.

3. A court of equity never decrees specific performance as a matter of absolute right. It is always subject to the sound and equitable discretion of the court, under all the circumstances of the case.

Waiving now the invalidity of the order for an election, I claim that it would be manifestly inequitable to compel the county to issue $150,000 of bonds to a corporation which is shown by the bill to be irretrievably insolvent.

The counties, cities, and townships of Kansas, as of most of the western states, have been wild and extravagant enough in issuing railroad bonds, but they have not as yet been seized with a mania to construct railroads without any reference to the completion and operation of the roads. The people of

Bourbon County probably supposed that the construction of the road-bed, the bridges, and culverts would be a guarantee that the iron, the rolling-stock, and the practical operation of the road would follow. If they have, according to the laws of Kansas, authorized such aid, and their agents have contracted for the issuance of the bonds when the road-bed should be completed, the county would, *at law*, be bound to issue them or pay the equivalent; but, when the aid of a court of equity is sought to specifically enforce the performance of the contract, other considerations than the mere technical maturity of the contract are proper and necessary, and if the court can see that the *real objects* sought to be accomplished by the party assuming the obligation will be lost, it will refuse its aid, leaving the parties to their remedies at law.

Can it be doubted what reply a court of equity would make to the railroad company if it was seeking to compel the county to issue these bonds; if it should be frank enough to allege, as the complainant has done, that it had no assets, no means to complete the road; that six years had elapsed since the road-bed, bridges, and culverts had been finished; that (as the bill might truthfully have stated) many of its embankments, its bridges, and culverts had been swept away by the floods, and that the remainder would soon be; that it never could complete or operate the road, but it demanded the bonds because the time had come, according to the contract, when it was to have them?

The complainant, as the assignee in fact of the railroad company, has no greater rights than it would have.

The complainant seeks to inject equities into his claim by allegations of representations of the County Commissioners that the bonds were legally voted, and would be issued; that the subscription to the stock had been made, etc.

Representations to create an estoppel must be as to matters of fact, not matters of opinion; they must be as to things which are declared *to be*, not as to things which are declared *will be;* they must be representations which the

party had a right to rely on, and which prevented him from further enquiry; the representations must be false, and the party making them must have had authority to make them.

The representations set out in the bill were not statements made in a bond under the seal of the county, but were simply the volunteer declarations of the persons making them.

The complainant was as capable as the commissioners of judging whether or not the election was legal, and whether or not the bonds would, or ought to be, delivered to an insolvent corporation.

The fact that the county subscribed to the stock of the company does not strengthen the complainant's bill, as no benefits have or can enure to the county from such subscription; the company having no assets, the stock does not represent anything. The whole of this part of the complainant's bill may be summed up this way: The people of Bourton County desired to aid in the construction of a railroad between Fort Scott and Humboldt. The commissioners undertook to call an election to obtain authority to issue bonds for that purpose, which call, it turns out afterwards, is invalid. The people vote for the aid to be given, as called for. The commissioners, disregarding the real object of the aid, which was to secure a railroad, and not merely a few bridges, cuts, and embankments to disfigure the face of the county, contract to subscribe for stock in, and issue bonds to, a company which had no funds to build a railroad, and no intention of building one, except so far as was necessary to get these bonds, use $125,000 in constructing the road-bed, and retire with $25,000 of bonds, besides a surplus in Allen County. The complainant, learning of this scheme, enters into a contract with the company to build the road to the point required to get the bonds. New commissioners coming in, and seeing through the plot, impose the new conditions, which the complainant refers to in his bill, but which he is does not state; but which conditions, it may be safely conjectured, have some relation

to the accomplishment of the real desire of the tax-payers, viz., the completion and operation of a railroad. In other words, the new conditions frustrate the intended fraud; hence the necessity of an appeal to a court of equity.

4. The complainant puts his right to come into a court of equity on the ground of the insolvency of the company. This is his alleged equity. But it also creates at least an equal equity in favor of the county, which is asked to burden itself with a large and oppressive debt, for which it can never receive any consideration.

5. The bill is multifarious. The contract between the the complainant and the railroad company is one thing, the contract between the railroad company and the county is another. The appellees have no joint interest in these contracts, yet are compelled to defend both, as though their interests were joint.

## SUMMARY.

1. The order for the election is void, under the decision of the Supreme Court of Kansas.
2. The Circuit Court has no jurisdiction.
3. A court of equity will not compel the county to issue the bonds, as the company cannot complete the road.
4. The equities of complainant and the county are equal.
5. The bill is multifarious.

Respectfully submitted,

J. E. McKEIGHAN,

*Of Counsel for Appellees.*